Criminal Division
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No. 76-1596

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN MAURO and JOHN FUSCO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

CITATIONS

Cases:

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JOHN MAURO and JOHN FUSCO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 544 F.2d 588. The opinion of the district court (App. E, *infra*) is reported at 414 F.Supp. 358.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on October 26, 1976. A petition

for rehearing with a suggestion for rehearing *en banc* was denied on March 15, 1977 (Apps. C and D, *infra*). On April 11, 1977, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including May 14, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a writ of *habeas corpus ad prosequendum* issued by a federal court to state authorities, directing the production of a state prisoner for trial on federal criminal charges, constitutes a detainer making applicable the terms and conditions of the Interstate Agreement on Detainers Act.

STATUTES INVOLVED

1. Section 2 of the Interstate Agreement on Detainers Act, 84 Stat. 1397-1402, 18 U.S.C. App., pp. 4475-4477, provides in pertinent part:

Article II

As used in this agreement:

(a) 'State' shall mean a State of the United States; the United States of America * * *.

* * * * *

Article IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer

and who is serving a term of imprisonment in any party State made available in accordance with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated * * *.

* * * * *

(e) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

2. 28 U.S.C. 2241 provides in pertinent part:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. * * *

* * * * *

(c) The writ of habeas corpus shall not extend to a prisoner unless—

* * * * *

(5) It is necessary to bring him into court to testify or for trial.

STATEMENT

1. In separate indictments filed in the United States District Court for the Eastern District of New York, respondents John Mauro and John Fusco were charged with criminal contempt of court, in violation

of 18 U.S.C. 401. The charges stemmed from respondents' refusal to testify, despite a grant of immunity, before a federal grand jury investigating violations of the federal drug laws (G. App. 1, 3, 5-6).[1]

At the time that the indictments were returned, respondents were incarcerated at different New York State correctional facilities serving sentences on state criminal charges.[2] Pursuant to separate writs of *habeas corpus ad prosequendum* issued by the United States District Court for the Eastern District of New York on November 5, 1975, each respondent was transferred from state to federal custody and produced before the district court for arraignment.[3] On November 24, 1975, respondents were arraigned upon their respective indictments and entered pleas of not guilty (G. App. 1, 3). They were then retained in federal custody at the Metropolitan Correctional Center in New York City.

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[1] "G. App." refers to the government's appendix in the court of appeals.

[2] Respondent Mauro was serving a sentence of three years to life imprisonment at the Auburn, New York, Correctional Facility, and respondent Fusco was serving a sentence of one year to life imprisonment at the Clinton Correctional Facility, Dannemora, New York (App. A, *infra*, p. 2a n. 1).

[3] Each writ was directed to the United States Marshal for the Eastern District of New York and the warden of the appropriate state correctional facility and ordered that respondents be produced before the district court on November 19, 1975 (G. App. 121, 125).

Subsequently, on December 2, 1975, both respondents appeared before the district court for the purpose of establishing trial dates. After setting dates that were acceptable to counsel for respondents, the court observed that the Metropolitan Correctional Center was "overcrowded" (G. App. 70). Accordingly, the court directed that respondents be returned to their respective state prisons and thereafter be "writ[ted] down" for federal trial. After further discussion, respondent Fusco expressed a preference to return to state prison, while respondent Mauro asked to remain at the Metropolitan Correctional Center if the warden had no objection (G. App. 69-71, 74-75). Shortly thereafter, both respondents were returned to state custody.

2. On April 26 and April 29, 1976, respectively, respondents Mauro and Fusco were again produced before the district court by means of writs of *habeas corpus ad prosequendum*. Prior to these appearances, respondents had moved for dismissal of their indictments on the ground that they had been returned to state custody without having first been tried on the federal charges, in violation of Article IV(e) of the Interstate Agreement on Detainers Act ("Agreement").[4] Article IV of the Agreement provides that the prosecuting authority of a member state in which criminal charges are pending against a defendant

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[4] The United States joined the Agreement by Act of December 9, 1970, Sections 1-8, 84 Stat. 1397-1403, 18 U.S.C. App., pp. 4475-4478.

Pub. L. 91-538,

serving a prison sentence in another member jurisdiction may lodge a detainer with the prison authority of that jurisdiction and, upon written request, obtain temporary custody of the prisoner for purposes of trial. The Agreement further provides that the prisoner must be tried (a) within 120 days of his arrival in the receiving state and (b) prior to being returned to the sending state, or the charges against him shall be dismissed with prejudice. Article IV(c) and (e).[5]

The district court granted respondent Mauro's motion to dismiss the indictment in an opinion and order dated May 17, 1976. The court then granted respondent Fusco's motion to dismiss on May 19, 1976, citing its decision in *Mauro* (G. App. 2, 4). The district court in *Mauro* rejected the government's argument that, because no detainer had been lodged against Mauro[6] and because Mauro had been pro-

[5] Article III provides that a prisoner may invoke the transfer provisions of the Agreement, when a detainer has been lodged, by filing a request with the appropriate authorities in the prosecuting jurisdiction for final disposition of the charges against him. He must thereupon be brought to trial (a) within 180 days of delivery of this request and (b) without being returned to the sending state after having been sent to the prosecuting state, or the charges shall be dismissed with prejudice. Article III(a) and (d).

[6] Although the district court opinion makes reference to a detainer lodged against respondent Mauro on July 9, 1975 (App. E, *infra*, p. 30a), this detainer related only to an earlier civil contempt adjudication; as respondent conceded (G. App. 101), it is therefore irrelevant to the subsequent criminal contempt prosecution at issue here. Both courts below ap-

duced before the district court solely pursuant to a writ of *habeas corpus ad prosequendum*, the provisions of the Agreement were inapplicable and provided no basis for dismissing the indictment. The court held that whenever the Agreement is "available" to produce a defendant for purposes of prosecution, "it is the exclusive means for doing so and the Government is charged with having invoked its provisions by use of the writ" (App. E, *infra*, p. 40a).

3. A divided panel of the court of appeals affirmed (App. A, *infra*, pp. 1a-23a). The majority concluded, as had the district court, that the writ of *habeas corpus ad prosequendum* is the equivalent of a detainer and that its use by federal officials in this case triggered the operation of the Agreement.[7] According to the majority, "[a]ny other construction would permit the United States to evade and circumvent the Agreement by simply utilizing the traditional writ" (*id.* at 8a; footnote omitted).[8]

In dissent, Judge Mansfield emphasized the significant functional and legal differences between a detainer and the writ *ad prosequendum*. He con-

parently agreed, since neither placed any reliance upon the existence of this detainer.

[7] At all times relevant hereto, New York was a party to the Agreement. N.Y. Crim. Proc. L. § 580.20 (1971).

[8] The court recognized (App. A, *infra*, p. 18a) that the writ "would have to be resorted to" whenever the United States sought to obtain the presence of a prisoner in a non-participating jurisdiction. At present there are four such jurisdictions: Alabama, Alaska, Mississippi, and Oklahoma.

cluded that the writ is not a detainer but rather a mandatory federal court order issued under the express authority of a federal statute (28 U.S.C. 2241 (c)(5)) that was neither repealed nor modified by the Agreement (App. A, *infra*, pp. 17a-19a, 23a). As a result, he would have ruled that the Agreement applies only to prisoners against whom detainers have been lodged and not to prisoners, like respondents, who are produced solely pursuant to the writ.[*] The Agreement, therefore, provided no basis for dismissal of the indictments in this case.

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals in this case, holding that a writ of *habeas corpus ad prosequendum* is a detainer within the meaning of the Interstate Agreement on Detainers, is in conflict with decisions of the Court of Appeals for the Seventh Circuit (*United States* v. *Ricketson*, 498 F.2d 367), and the Court of Appeals for the Fifth Circuit (*United States* v. *Scallion*, 548 F.2d 1168, petition for a writ of certiorari pending, No. 76-6559). Moreover, because federal prosecutors have regularly se-

[*] Since no detainers had been lodged against respondents, this case does not present the issue whether use of the writ *ad prosequendum* after the federal government has lodged a detainer against a prisoner functions as a "request" under the Agreement and subjects the government to the terms of the Agreement. See *United States* v. *Ford*, 550 F.2d 732 (C.A. 2), rehearing denied, May 9, 1977.

cured the presence of state prisoners for trial by means of the historical writ of *habeas corpus*, rather than by invoking the provisions of the Interstate Agreement on Detainers, and have quite commonly returned those prisoners to state facilities pending trial, the uncertainty created by such conflict affects a substantial number of past and pending cases and provokes confusion in the implementation of both the federal *habeas corpus* statute and the Agreement. This Court should resolve this conflict.

1. In *United States* v. *Ricketson*, *supra*, the court expressly rejected the defendant's argument that pending federal charges against him should have been dismissed under the Interstate Agreement on Detainers because federal authorities, having secured his presence by a writ of *habeas corpus ad prosequendum*, had returned him to state prison without trial. Acknowledging that the defendant had been delivered from and returned to state custody three times before trial, the court nevertheless noted (498 F.2d at 373) that "each federal custody was before any detainer was filed, so that the Agreement is inapplicable." That conclusion is directly contrary to the holding of the majority below that the writ itself is a detainer for purposes of the Agreement.

The Court of Appeals for the Fifth Circuit, in *United States* v. *Scallion*, *supra*, has taken a similar view. In *Scallion*, the defendant was produced in federal court by a writ of *habeas corpus ad prosequendum* in December 1973, returned to state prison without trial, and then produced again by writ of

habeas corpus ad prosequendum for trial in September 1974. He sought dismissal of the federal charges because he had been returned to the state prison [10] and because he had not been tried within 120 days of the December 1973 production, as he claimed was required by Article IV(c) of the Agreement. The court of appeals, noting that "[b]oth historically and substantively, the writ of habeas corpus ad prosequendum issued by a federal district court is entirely different from a 'detainer' [as defined in the House and Senate Judiciary Committee Reports]" (548 F.2d at 1173), rejected Scallion's contention (*ibid.*; footnotes omitted): [11]

> The writ of habeas corpus ad prosequendum issued by a federal district court is an order commanding the production of a prisoner promptly or by a specified date, whereupon he is turned over to a federal custodian, usually a U.S. Marshall; whereas a detainer is merely a notice that the prisoner is wanted to face pending criminal charges and requires further process ("a written request for temporary custody or availability," as provided in Article IV(a)) before the

[10] Scallion was returned to state prison at his request. The court of appeals held, therefore, that he was estopped from obtaining dismissal of his federal charges under Article IV (e) of the Agreement. As we discuss in the text, the court was nevertheless required to consider whether the defendant was entitled to dismissal of charges for failure to comply with the speedy trial provisions of the Agreement.

[11] In a footnote the court stated (548 F.2d at 1173 n. 8): "We cannot follow the Second Circuit's holding to the contrary in a split decision in *United States* v. *Mauro* • • •."

> prisoner is turned over. There is nothing in the Act or its legislative history indicating any intent that the definition of a detainer be stretched to the point of including an order under a writ of habeas corpus ad prosequendum issued by a federal district court pursuant to authority of 28 U.S.C. § 2241(c)(5), and we regard it as incredible that the Judiciary Committees of both the House and Senate would fail to even mention the writ had such been the intent. Accordingly, we conclude that "detainer" for purposes of the Act does not include a writ of habeas corpus ad prosequendum issued by a federal district court. It follows, and we so hold, that the Agreement does not apply to such a writ.

2. The decision in this case, if widely followed, would require the dismissal of numerous federal indictments, and perhaps the vacation of many more federal convictions, despite the fact that federal prosecutors and district courts, in securing attendance of state prisoners by means of a writ of *habeas corpus ad prosequendum*, proceeded upon the authority of an existing federal statute.[12] Prior to the district court's decision in *Mauro*, federal prosecutors

[12] The writ derives from ancient common law usage and more particularly from Section 14 of the First Judiciary Act, 1 Stat. 81. See, *e.g.*, *Ex parte Bollman*, 4 Cranch 75, 95-98; *Ex parte Burford*, 3 Cranch 448, 449; *Carbo* v. *United States*, 364 U.S. 611, 614.

The detainer is of much more recent vintage and is nothing more than a notification, from one State to another, that a particular inmate is wanted to face charges in the notifying State.

and defense counsel generally assumed that the Agreement did not apply to production of prisoners by writ of *habeas corpus ad prosequendum*, particularly when no detainer had been lodged with state prison authorities.[13] Insofar as we can determine, the uniform practice of federal prosecutors, before and after enactment of the Agreement by Congress in 1970, has been to apply to the district courts for writs of *habeas corpus ad prosequendum* and, upon conclusion of the proceeding for which the state prisoner was produced, to move for satisfaction of the writ and return of the prisoner "from whence he came." We believe that this practice is entirely reasonable; "[t]he legislative history of the Interstate Agreement on Detainers Act • • • makes it clear that Congress did not intend the machinery established thereby to be the exclusive means of effecting a transfer of a prisoner for purposes of prosecution" (*United States* v. *Scallion*, *supra*, 548 F.2d at 1171).

After the district court's decision in *Mauro*, litigation of claims under the Agreement has increased markedly. The question whether the Agreement provides the sole means by which federal prosecutors can secure the presence of state prisoners is now

[13] Defense counsel in *United States* v. *Ricketson*, *supra*, did argue that the agreement applied to a writ of *habeas corpus ad prosequendum*, even in the absence of a detainer. That contention was rejected (see p. 9, *supra*), and no further cases raising the issue in the context of a federal writ were reported before the decision of the district court in *Mauro*. Cf. *United States ex rel. Esola* v. *Groomes*, 520 F.2d 830 (C.A. 3) (state writ issued to federal authorities).

pending in, or has recently been decided by, several circuits. *United States* v. *Kenaan*, 422 F. Supp. 226 (D. Mass.), appeal pending, C.A. 1, No. 77-1014, argued April 5, 1977; *United States* v. *Ford*, 550 F.2d 732 (C.A. 2), rehearing denied, May 9, 1977; *United States* v. *Cyphers and Ferro*, C.A. 2, Nos. 76-1131, 76-1160, decided February 8, 1977, pending on petition for rehearing and rehearing *en banc*; *United States* v. *Sorrell*, C.A. 3, No. 76-1647, decided November 29, 1976, vacated January 27, 1977, argued *en banc* May 12, 1977; *United States* v. *Scallion*, *supra*; *United States* v. *Roberts*, 548 F.2d 665 (C.A. 6); *Walker* v. *United States*, E.D. Mich., Civ. No. 6-72286, Cr. No. 5-81211, decided March 24, 1977; *Speed* v. *United States*, C.A. 8, No. 76-1126, appeal pending; *United States* v. *Adkins*, C.A. 9, No. 76-3523, appeal pending.[14] In addition, federal courts have been asked to decide whether defendants may raise the applicability of the Agreement for the first time on appeal (*United States* v. *Cyphers and Ferro*, *supra*) and on motions for relief under 28 U.S.C. 2255 (*Speed* v. *United States*, *supra*; *Walker* v. *United States*, *supra*; *Strawderman* v. *United States*, E.D. Va., No. 76-0490-R). One district court has ruled that failure to seek dismissal of charges under the Agreement, after service of a writ and return of

[14] Federal authorities had filed detainers in *Ford*, *Cyphers and Ferro*, *Sorrell*, and *Speed*. Those cases, therefore, involve the question whether, if the Agreement applies, a writ of *habeas corpus ad prosequendum* is a "request" within the meaning of Article IV(a). See note 9, *supra*.

the prisoner to state prison, by itself constitutes ineffective assistance of counsel entitling a convicted defendant to relief (*Walker* v. *United States, supra*).

At present, federal prosecutors cannot be sure whether they may continue the historical practice of securing prisoners by writ of *habeas corpus* and returning them to state prison after satisfaction of the writ or whether they must abandon that practice and proceed solely under the Agreement. There are few federal detention facilities throughout the country designed for the purpose of holding prisoners awaiting trial, and such facilities as do exist are often overcrowded. Because retention of state prisoners in federal facilities is often difficult, as in the present case, and because the state facilities in any event may be located only a short distance from the federal court, application of the Agreement will frequently be undesirable and unnecessary. Yet a failure to follow the Agreement now results in dismissal of federal charges with prejudice under Article IV (e) in an increasing number of jurisdictions. Resolution of this uncertainty is therefore of considerable importance to the effective administration of the federal criminal laws.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

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MAY 1977.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Nos. 183, 184—September Term, 1976

(Argued September 13, 1976
Decided October 26, 1976)

Docket Nos. 76-1251, 76-1252

UNITED STATES OF AMERICA, APPELLANT

—against—

JOHN MAURO AND JOHN FUSCO, APPELLEES

Before: ANDERSON, MANSFIELD and MULLIGAN, *Circuit Judges.*

MULLIGAN, *Circuit Judge*:

This is a consolidated appeal by the United States from two orders which dismissed indictments against two defendants because of the Government's failure to comply with the Interstate Agreement on Detainers, 18 U.S.C., App. The issue involved is one of first impression in this court.

On November 3, 1975, John Mauro and John Fusco were separately indicted in the Eastern District of New York on charges of criminal contempt of court in violation of 18 U.S.C. § 401. Both had refused to testify before a federal grand jury and at the time of their indictment both were inmates in New York State penal institutions.[1] On November 5, 1975 separate writs of *habeas corpus ad prosequendum* were issued by a district judge of the United States District Court, Eastern District of New York, directing the wardens of each of the New York State institutions to produce the inmates before the federal court on November 19, 1975. On November 24, 1975, Mauro and Fusco were arraigned before Hon. John R. Bartels of the Eastern District of New York, and both pleaded not guilty. On December 2, 1975 both again appeared before Judge Bartels for the purpose of fixing a trial date. Mauro's counsel agreed to a March 17, 1976 date and Fusco's counsel accepted a February 4, 1976 trial date. In view of the crowded conditions at the Metropolitan Correctional Center, Judge Bartels ordered the defendants to be returned to state custody indicating that each should be "writ down" shortly before the federal trials.[2]

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[1] Mauro was serving a three-year to life term at the Auburn Correctional Facility, Auburn, New York. Fusco was serving a one-year to life term at the Clinton Correctional Facility, Dannemora, New York.

[2] Transcript of Dec. 2, 1975, Proceedings before Judge Bartels, at 7-8 (Govt. App. at 70-71).

On March 2 and April 14, 1976 respectively, writs of *habeas corpus ad prosequendum* were again issued for Fusco and Mauro who were produced in the Eastern District of New York on April 29 and April 26, 1976. Prior to their appearance each defendant had separately moved for dismissal of his indictment on the ground that the United States had violated Article IV(e) of the Interstate Agreement on Detainers since he had been returned to state custody without having first been tried on the federal indictments. In an opinion and order dated May 17, 1976, reported in 414 F. Supp. 358 (E.D.N.Y. 1976), Judge Bartels granted Mauro's motion and dismissed the indictment. On May 19, 1976, he granted Fusco's motion to dismiss on the basis of his prior opinion in the Mauro motion. This appeal followed.

I

The Interstate Agreement on Detainers (Agreement) was enacted into law by the Congress in 1970 on behalf of the United States. It had already been adopted by 28 states and since then by all of the remaining states with the exception of Alabama, Alaska, Mississippi and Oklahoma. Its purpose and objectives are set forth in Article I:

> The party States find that charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs

of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints. The party States also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

Article II(a) further provides:

> 'State' shall mean a State of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

The legislative history of the Agreement is not particularly enlightening probably because there was no opposition in Congress to its enactment. See 116 Cong. Rec. 38840 (1970). In essence Article III provides a mechanism for a prisoner in a party State against whom a detainer has been lodged by any other party State to request a final disposition of the untried charge within 180 days of his written request. By the same token Article IV provides a method for prosecutors to secure prisoners serving sentences in other jurisdictions for a prompt trial within 120 days after his arrival in the receiving

jurisdiction. In explaining the need for the legislation Congressman Kastenmeier, its sponsor, stated:

> The Bureau of Prisons has advised that a prisoner who has a detainer lodged against him is seriously disadvantaged. He is in custody and cannot seek witnesses or preserve his defense. He must often be kept in close custody and is ineligible for desirable work assignments. Thus he may lose interest in institutional opportunities because he cannot tell when, if ever, he will be in a position to use the skills he is developing. The agreement offers a prisoner the opportunity to secure a greater degree of certainty as to his future and enables prison authorities to provide better plans for his treatment.
>
> On the other hand, the agreement also provides a method for prosecutors to secure prisoners serving sentences in other jurisdictions for trial, before the passage of time has dulled the memory or made witnesses unavailable.

Where, as here, the prosecutor initiates the statutory mechanism the defendant is not only entitled to a trial within 120 days but Article IV(e) provides:

> If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

II

The United States on appeal, as it did below, seeks to avoid the clear impact of Article IV(e) by arguing that the defendants here were produced by the writ of *habeas corpus ad prosequendum*, which it urges should not be treated as a detainer under the Agreement.[3] The Government argues that the habeas writ here employed is the traditional and time-honored method employed by federal courts to obtain state prisoners for trial pursuant to 28 U.S.C. § 2241 (c)(5). While this may be perfectly true, it does not follow that the habeas writ is not a detainer within the Agreement. The term is not defined in the Agreement. However, Congressman Kastenmeier, in proposing the Agreement, stated, "For the purpose of this legislation a detainer is a notification filed with the institution in which a prisoner is serving

[3] The Government contends that appellee Fusco waived his rights under Article IV(e) because he requested to be returned to the state prison following his arraignment. Immediately prior to Fusco's request, the request of another defendant (Robert Marino) to remain in federal custody was denied because of overcrowding in the correctional center. In light of this, it would have been futile for Fusco to make the same request before the same judge. Moreover, for it to have been effective as a waiver it must have been an "intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). The record is barren of any indication that this was so. Fusco did all that was required of him to claim his remedy under Article IV(e)—"allege that one jurisdiction has requested his transfer from another jurisdiction for trial and returned him without trying him to the first jurisdiction." *United States* v. *Cappucci*, 342 F. Supp. 790, 793 (E.D. Pa. 1972).

a sentence, advising that he is wanted to stand trial on pending criminal charges in another jurisdiction." 116 Cong. Rec. 13999 (1970). The same language is employed in the Senate Report. S. Rep. No. 1356, 91st Cong., 2d Sess., 3 U.S. Code and Admin. News 4864, 4865 (1970). This is substantially the notification filed with the state prison wardens in the instant case.[4]

The Government urges however that the habeas writ is mandatory and compels the production of the state prisoner and therefore is not comparable to a detainer.[5] However, as this court has recently noted,

[4] Thus that original writ served on the warden of the Auburn Correctional Facility provided:

> YOU ARE HEREBY COMMANDED to have the body of John Mauro now detained under your custody, as it is said, under safe and secure conduct, in civilian clothes, before the United States District Court for the Eastern District of New York, at the United States Courthouse, in such courtroom as shall be designated, in the Borough of Brooklyn, City, State and Eastern District of New York, on the 19th day of November at 10 o'clock in the forenoon of that day, for trial before said United States District Court for the Eastern District of New York upon an indictment filed in said Eastern District of New York against the said John Mauro charging him with violation of Title 18 United States Code, Section 401 and, at the termination of the proceedings in the said United States District Court on that particular day, that you return him forthwith to the Warden, Auburn Correctional Facility, Auburn, N.Y. under safe and secure conduct.

The writ served to obtain Fusco was in the same form.

[5] This argument is allegedly bolstered by the language of the statute. It is the Government's contention that since Article IV(a) provides that "the Governor of the sending

"While a writ of *habeas corpus ad prosequendum* may use mandatory language, the jurisdiction to which such a writ is addressed is relied upon to cooperate in turning over the defendant to the other sovereign." *United States* v. *Oliver*, 523 F.2d 253, 258 (2d Cir. 1975). See also *Carbo* v. *United States*, 365 U.S. 611, 621 (1961). In the *Oliver* case, the first federal habeas writ granted in March 1973 was not executed because of the need of the Michigan prosecutor to expeditiously dispose of pending state proceedings and a second writ was necessary in July 1973. We conclude that the writ of *habeas corpus ad prosequendum* is a detainer entitling the state inmate to the protection provided in Article IV [6] and specifically to a trial before his return to the state institution. Any other construction would permit the United States to evade and circumvent the Agreement by simply utilizing the traditional writ.[7]

State may disapprove the request for temporary custody or availability," the United States is excluded by the very language of the provision from availing itself of that option. However, since 18 U.S.C. App., § 3 provides, "The term 'Governor' as used in the agreement on detainers shall mean with respect to the United States, the Attorney General . . . .", this contention is without merit.

[6] We note that Article IV(c) permits continuances beyond the 120 day limit for good cause shown but that Article IV(e) creates no exceptions to the requirements that the defendant not be returned to state custody untried. *United States* v. *Ricketson*, 498 F.2d 367, 373 (7th Cir.), cert. denied, 419 U.S. 965 (1974).

[7] "There is a presumption against construing a statute as containing superfluous or meaningless words or giving it a

In *United States ex rel. Esola* v. *Groomes*, 520 F.2d 830 (3d Cir. 1975), where a federal prisoner was produced in a state court pursuant to a writ of *habeas corpus ad prosequendum* secured by a state prosecutor, the state similarly argued that since the request was made pursuant to a habeas writ and not pursuant to Article IV of the Agreement, its remedial provisions were not relevant. In rejecting this argument the Third Circuit held that the Agreement provided the exclusive means of effecting a transfer between two participating jurisdictions for the purpose of prosecution. Id. at 837; accord, *United States* v. *Sorrell*, 413 F. Supp. 138, 140 (E.D. Pa. 1976). See also statement of Senator Hruska, 116 Cong. Rec. 38840 (1970), "By approving [the Agreement] we can insure that the United States will become part of this vitally needed system of simplified and uniform rules for the disposition of pending criminal charges and the exchange of prisoners."

It has been suggested that the habeas writ, since it is executed at once, cannot have the adverse effects upon rehabilitation which the Agreement was designed to avoid. While it is true that the expeditious disposition of pending charges in another jurisdiction was a prime concern of the Agreement, it was also its aim to eliminate the uncertainties which obstruct programs of prisoner treatment and rehabilitation. Article IV makes it clear that the prisoner was not

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construction that would render it ineffective." *United States* v. *Blasius*, 397 F.2d 203, 207 n. 9 (2d Cir. 1968).

only to be tried promptly but that he would not be sent back until tried by the requesting jurisdiction. In this case both prisoners were sent back in December 1975, to state prisons with trial dates set for federal trials and were not brought back to the federal forum until late in April 1976. Their ability or even desire to participate in state treatment or rehabilitative programs was obviously affected by the uncertainties of the federal trial and the possible sentence to be meted out. In view of the clear language of Article IV(e), we believe the Agreement was plainly designed to avoid the shuttling of prisoners back and forth between the penal institutions of the two jurisdictions. The disruptive effect upon the prisoner's morale is the same irrespective of the caption on the paper which produces him in the jurisdiction seeking him for trial. The participating parties to the Agreement have moreover solemnly promised that his trial will be expeditious and will take place before he is returned on penalty of a dismissal of the indictment with prejudice.

III

The Government further argues that the United States adopted the Agreement only as a sending and not a receiving State. Article II(b) defines a "Sending State":

> 'Sending State' shall mean a State in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to article III hereof or at the time that a request for custody or availability is initiated pursuant to article IV hereof.

Article II(c) defines a "Receiving State":

> 'Receiving State' shall mean the State in which trial is to be had on an indictment, information, or complaint pursuant to article III or article IV hereof.

In short, the Government urges that the Agreement only applies to the United States when a state tribunal is seeking to try a federal prisoner in a state court. Such construction would of course simply eliminate the problem but there is nothing at all in the Agreement to support the interpretation now urged by the Government. Article II(a), as we have indicated, defines a State as "a State of the United States; the United States of America, a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico." The statute places the United States on the same footing as any State which is a signatory to the compact. *United States* v. *Sorrell, supra,* 413 F. Supp. at 140. There is admittedly nothing at all in the Agreement itself to support the distinction proffered by the Government. In fact a reading of Article II(a)(b) and (c) compels the conclusion that the United States is both a sending and receiving State.

The Government maintains that the motivation for the congressional enactment of the Agreement was such holdings as *Dickey* v. *Florida*, 398 U.S. 30 (1970) and *Smith v. Hooey*, 393 U.S. 374 (1969) which re-

quired the states to make a diligent effort to bring a defendant to trial even though he is serving a sentence in a federal penal institution. The Agreement, it is argued, provides a legal basis enabling the states to procure federal prisoners thus preserving the Sixth Amendment constitutional rights of these prisoners to a speedy trial. S.Rep.No. 1356, 91st Cong., 2d Sess., 3 U.S. Code & Admin. News 4864 (1970). The Government in its brief here states that "it appears that federal participation was not sought until the Supreme Court decided *Smith* v. *Hooey*, 393 U.S. 374 (1969)."[6] The legislative history of the Agreement, however, establishes that the Department of Justice recommended the identical legislation in the 90th Congress; that it was passed by the House on May 9, 1968 but that the Senate failed to act.[7] H.Rep. 1018, 91st Cong., 2d Sess. 1-2 (1970); 116 Cong. Rec. 13999 (1970).

In any event, aside from the fact that the Agreement as enacted fails to make the distinction now sought by the Government, Article VIII itself provides, "This agreement shall enter into *full force and*

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[6] Government brief at 7.

[7] Judge Bartels also noted below the letter of Graham W. Watt, Assistant Commissioner of the District of Columbia, to the Chairman of the House Committee on the Judiciary, in which it was clearly indicated that the United States would be participating as a receiving State. *United States* v. *Mauro*, 414 F. Supp. 358, 361 (E.D.N.Y. 1976). There is little doubt that this letter is part of the legislative history. See *Hoffman* v. *Palmer*, 129 F.2d 976, 987-88 (2d Cir. 1942), aff'd, 318 U.S. 109 (1943).

effect as to a party State when such State has enacted th same into law. A State party to this agreement may withdraw herefrom by enacting a statute repealing the same" (emphasis supplied). The Senate and House Reports specifically noted this language. S.Rep.No. 1356, 91st Cong., 2d Sess., 3 U.S. Code & Admin. News 4864, 4866 (1970); H.Rep.No. 1018, 91st Cong., 2d Sess. 3 (1970). What the Government seeks here is a judicial repeal of at least part of the Agreement, a request more appropriately addressed to the Congress than to this court. See *Dorszynski* v. *United States*, 418 U.S. 424, 442 (1974).

The Government also urges that by adopting the Agreement the Congress could hardly have intended to annul or repeal the ancient habeas writ which is provided for by statute, 28 U.S.C. § 2241(c)(5). However, this argument overlooks the fact that at the time the Agreement was offered to the Congress only 25 states had adopted the compact. H.Rep. 1018, 91st Cong., 2d Sess. (1970). Obviously the writ, and not the Agreement, would have to be resorted to where the United States sought to obtain a defendant imprisoned in a non-participating jurisdiction. The need for the writ still remains where a prisoner is incarcerated in Alabama, Alaska, Mississippi and Oklahoma. In any event the writ, in our view, is the detainer provided for in the Agreement.

Finally, the Government relies on the proposed Criminal Justice Reform Act of 1975 (S.1), section 3201(a), which provides in part:

> (a) Adoption of the Agreement by the United States—The United States solely as a 'sending state,' and the District of Columbia are parties to the Interstate Agreement on Detainers . . . .

The report of the Senate Committee on the Judiciary on S.1 states that section 3201 the existing enabling act of the Agreement:

> has been amended to clarify the intent of Congress by providing that the Federal Government is a participant in the Agreement only in the capacity of sending state. Federal prosecution authorities and all Federal defendants have always had and continue to have recourse to a speedy trial in a Federal court pursuant to 28 U.S.C. 2241(c)(5), the Federal writ of *habeas corpus ad prosequendum*. The Commitee does not intend, nor does it believe that the Congress in enacting the Agreement in 1970 intended, to limit the scope and applicability of that writ.

While the Senate Committee in 1975 does not believe that the 91st Congress intended to fully adopt the Agreement it enacted in 1970, we agree with Judge Bartels that since S.1 has not yet been enacted by the Congress, it is irrelevant for the purpose of construing the Agreement. It is well established that the views of a later Congress as to the construction of a statute adopted by an earlier Congress have very little, if any, significance. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968); *United States* v. *Wise*, 370 U.S. 405, 411 (1962); *Gemsco Inc.* v. *Walling*, 324 U.S. 244, 265 (1945); cf. *N.C.*

Freed Co. v. *Board of Governors of Federal Reserve System*, 473 F.2d 1210, 1217 n. 23 (2d Cir.), cert. denied, 414 U.S. 827 (1973).

In sum, we conclude that the Agreement in clear and unequivocal language commits the United States to all of its terms including Article IV. Any construction which would cast the United States in the role of a limited partner is at odds with the entire spirit and scope of the Agreement. If the United States is to succeed in establishing that the Congress only intended to cover state detainers and not federal detainers, this would certainly represent such a major and substantial departure from the all embracing language employed in Article II, that any contrary intention should be clearly established in the legislative history of the enactment. We have carefully reviewed that history and there is not a single mention of the United States participating only in its capacity as a sending State until the Senate Committee Report on the proposed Justice Reform Act of 1975 (S.1). This reflects, in our view, a recognition by some members of the Congress that perhaps the Congress should not have acted as it did—that the sanctions of Article IV in particular are discomfiting to the Government. However, it is not our role to extricate the United States from the unequivocal terms of the Agreement enacted by the Congress. The indictments below were properly dismissed with prejudice and the orders are affirmed.

MANSFIELD, *Circuit Judge* (Dissenting):

I respectfully dissent for the reason that the writ of habeas corpus issued by the Eastern District of New York was not a "detainer" but a valid order pursuant to 28 U.S.C. § 2241(c)(5), a federal law which has not been repealed or modified by the Interstate Agreement on Detainers Act ("Detainers Act"). Article IV(e) of the Detainers Act, which requires dismissal where a prisoner produced under that Act is returned to the sending state without trial, therefore does not apply.

The majority, in my view, has failed to recognize and give effect to the significant functional and legal differences between a detainer and a federal writ of habeas corpus. A detainer, as its name implies, is an administrative notification lodged with a prison authority, advising that a certain prisoner in its custody is wanted for prosecution elsewhere and requesting that the prisoner be detained or held to face the out-of-state charge. See S. Rep. No. 1356, 91st Cong., 2d Sess., 1970 U.S. Code and Admin. News, 4864-65. The detainer is not an order commanding or obligating the custodian to produce the prisoner; it is merely a request, usually respected as a matter of comity between states, to detain the prisoner so that a representative of the requesting state may take custody, with the consent and cooperation of the holding state, and transport or release him to the requesting state for the purpose of facing the new charge. Prior to a state's adoption of the Detainers

Act it usually did not surrender the prisoner to the other state until the termination of his incarceration in the holding state, since that state was not obligated, except to the extent that it expressly elected to do so by extradition statute or as a matter of comity, to produce a prisoner who was the subject of a detainer or writ of habeas corpus lodged with it by another state. See, e.g., *May* v. *Georgia*, 409 F. 2d 203, 204 (5th Cir. 1969); Schindler, Interjurisdictional Conflict and the Right to a Speedy Trial, 35 U. Cin. L. Rev. 179, 185 (1966). Similarly the federal government was not under any such obligation, see *Ableman* v. *Booth*, 62 U.S. (21 How.) 506 (1858); *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872); Warren, Federal and State Court Interference, 43 Harv. L. Rev. 345, 353-59 (1930), except to the extent that Congress authorized a prisoner to be transferred to the requesting state, see, e.g., Title 8 U.S.C. § 4085.

Unlike a detainer, a federal writ of habeas corpus ad prosequendum is a federal court order commanding the immediate production of a prisoner at a federal trial. Congress has expressly authorized the federal district courts, without qualification, to issue such writs for the production of a prisoner where "it is necessary to bring him into court to testify or for trial." 28 U.S.C. § 2241(c)(5). Upon being served with a writ of habeas corpus ad prosequendum, the state authority does not treat the writ as a detainer; it turns the prisoner over at once to the federal custodian, usually a U.S. Marshal. Nor is the prisoner

thus surrendered by the state pursuant to any enabling law passed by it, such as the Detainers Act, but pursuant to § 2241, which represents the supreme law of the land, Const. Art. VI, cl. 2, and extends beyond the geographical boundaries of the district court which issued the writ. *Carbo* v. *United States*, 364 U.S. 611 (1961). Upon termination of the federal trial the marshal returns the prisoner to the state's custody and the writ is discharged. At no time does the writ have the effect of a detainer.

Because state authorities have apparently always complied with the commands of such federal writs, the federal government has never, according to our research, been called upon to invoke federal supremacy. See, e.g., *Ex parte Royall*, 117 U.S. 241 (1886), where the Supreme Court stated "That the petitioner is held under the authority of a State cannot affect the question of the power or jurisdiction of the Circuit Court to inquire into the cause of his commitment, and to discharge him if he be restrained of his liberty in violation of the Constitution," 117 U.S. at 294, but went on to hold that comity required the federal courts to defer passing upon such questions until the applicant had exhausted his state remedies. See, generally, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1048-49 (1970). Similarly in *Carbo* v. *United States*, 364 U.S. 611 (1961), the Supreme Court, in holding that federal district courts have the power to issue writs of habeas corpus ad prosequendum extraterritorially, recognized that the existence of comity between sov-

ereignties made it unnecessary to invoke the Supremacy Clause, stating:

> "In view of the cooperation extended by the New York authorities in honoring the writ, it is unnecessary to decide what would be the effect of a similar writ absent such cooperation." 364 U.S. at 621 n. 20.

However, I have no doubt that if a state institution refused to obey a federal writ of habeas corpus ad prosequendum properly issued pursuant to § 2241 and thus provoked a federal-state confrontation, the writ would be held enforcible against the institution under the Supremacy Clause.[1]

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[1] I am aware of a line of decisions stemming from the Supreme Court's decision in *Ponzi* v. *Fessenden*, 258 U.S. 254 (1922), expressing or implying the view that compliance with a writ of habeas corpus is a matter of comity. See, *e.g.*, *United States* v. *Oliver*, 523 F.2d 253, 258 (2d Cir. 1975); *Lunsford* v. *Hudspeth*, 126 F.2d 653 (10th Cir. 1942); *Nolan* v. *United States*, 163 F.2d 768 (8th Cir. 1947); *United States ex rel. Moses* v. *Kipp*, 232 F.2d 147 (7th Cir. 1956); *Crow* v. *United States*, 323 F.2d 888 (8th Cir. 1963); *Terlikowski* v. *United* States, 379 F.2d 501 (8th Cir.), *cert. denied*, 389 U.S. 1008 (1967); *McDonald* v. *Ciccone*, 409 F.2d 28 (8th Cir. 1969); *United States ex rel. Brown* v. *Malcolm*, 350 F. Supp. 496, 499-50 n. 9 (E.D.N.Y. 1972). None of these decisions, however, involved a refusal by a state to obey a federal writ. Nor do they discuss the question of whether the Supremacy Clause obligates a state to comply with a federal writ. In many of the cases the statements amount to dicta, since the issue was the prisoner's standing to object to the writ.

For these reasons I do not find any inconsistency between these decisions, which recognize the role of comity in securing federal-state cooperation, and a case requiring application of the Supremacy Clause where comity might fail. This

For present purposes the important point is that the Detainers Act applies only to those subject to detainers, not to persons surrendered pursuant to § 2241 writs or to proceedings in connection with which such writs are used. The reasons underlying the adoption of the Detainers Act, furthermore, militate against its being construed as a repeal or modification of § 2241, since they do not pertain to the issuance of a writ of habeas corpus ad prosequendum. The primary purpose of the Detainers Act is to protect a prisoner against the detrimental consequences of a detainer being lodged against him, which prior to the Act caused him to lose various privileges and to remain ineligible for rehabilitation or work programs as long as the detainer remained outstanding, a period usually lasting for the duration of his imprisonment. The Detainers Act enables a prisoner to clear a detainer lodged against him by obtaining a speedy trial of the out-of-state charges which led to the detainer being lodged.

The writ of habeas corpus ad prosequendum, as distinguished from a detainer, has never had any such prejudicial consequences for the prisoner; it is executed at once and, upon return of the prisoner to the state institution, it does not remain outstanding against him as would a detainer. Thus the writ

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issue did not exist in *Ponzi* for the reason that it involved a *state* rather than a federal writ and the question was whether the state had jurisdiction to try a prisoner who had been turned over by federal authorities as a matter of comity.

is wholly unrelated to detainers or their prejudicial consequences.

Nor was Art. IV of the Detainers Act, which permits a state lodging a detainer against a prisoner in another state or in federal custody to request and obtain production of the prisoner for trial unless disapproved by the governor of the sending state, intended to apply to proceedings under § 2241. The purpose of Art. IV is to assure that states which formerly were powerless to obtain production of prisoners held by other states or by the federal government will now be able to secure their presence, subject to certain conditions. One of these conditions is that the receiving state, after obtaining the detained prisoner merely upon request, will not abuse that privilege by returning him untried, since this would have the effect of reinstating and indefinitely prolonging the detainer lodged against him by the receiving state, with its detrimental effects. Since the federal government obtains custody under a § 2241 writ without lodging any detainer, Art. IV does not have any effect on its action.

That Congress, in adopting the Detainers Act, did not intend to classify federal writs of habeas corpus as detainers or to subject such writs to the limitations of the Act, is further evidenced by the following later statement of the Senate Committee on the Judiciary, issued when it expressly recommended clarification of the matter in the proposed Criminal Justice Reform Act of 1975 (S. 1):

> "Federal prosecution authorities and all Federal defendants have always had and continue to have recourse to a speedy trial in a Federal court pursuant to 28 U.S.C. 2241(c)(5), the Federal writ of *habeas corpus ad prosequendum*. The Committee does not intend, nor does it believe that the Congress in enacting the Agreement in 1970 intended, to limit the scope and applicability of that writ."

Although this statement post-dated the adoption of the Detainers Act, it is significant for the reason that 12 of the 15 members of the Committee who issued it had been members who joined in the original report recommending adoption of the Detainers Act (Sen. Rep. 91-1356).

The Third Circuit's recent decision in *United States ex rel. Esola* v. *Groomes*, 520 F.2d 830 (3d Cir. 1975), relied upon by the majority, is clearly distinguishable. In that case the court properly treated a Monmouth County, New Jersey, writ of habeas corpus as a detainer under the Detainers Act, holding that dismissal of a New Jersey charge against a federal prisoner obtained under such a writ would be mandated by Art. IV(e) of the Act if the plaintiff should prove that the state returned him to federal custody in Danbury, Connecticut, without trial. The essential distinguishing feature, of course, was that the New Jersey writ, unlike the federal writ in the present case, could not, independent of the Detainers Act, have effectively commanded the federal authorities at Danbury to produce or release the prisoner

for trial in New Jersey. It could only function as a detainer or request under Art. III of the Detainers Act, and it was so treated by the court.

Thus nothing in the language or legislative history of the Detainers Act indicates any intent on the part of Congress to repeal or modify § 2241 or to supplant federal writs of habeas corpus, which serve one distinctive purpose, with detainers, which serve another. The two statutes do not conflict with one another. When they are so easily reconcilable, it is error, in my view, to hold in effect that § 2241 is implicitly repealed in part by the Act. See *Rosenkrans* v. *United States*, 165 U.S. 257 (1897).

Accordingly I would hold that where a federal court obtains the presence of a prisoner for pleading or trial by a writ of habeas corpus ad prosequendum issued pursuant to 28 U.S.C. § 2241(c)(5), Art. IV (e) of the Detainers Act has no application.

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-six day of October one thousand nine hundred and seventy-six.

Present: Hon. Robert P. Anderson
Hon. Walter R. Mansfield
Hon. William H. Mulligan
Circuit Judges,

76-1251
76-1252

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

JOHN MAURO, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Eastern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and they hereby are affirmed in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

by _____
VINCENT A. CARLIN
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifteenth day of March, one thousand nine hundred and seventy-seven.

Present: Hon. Robert P. Anderson,
Hon. Walter R. Mansfield,
Hon. William H. Mulligan,
Circuit Judges.

76-1251
76-1252

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

JOHN MAURO, DEFENDANT-APPELLANT.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

JOHN FUSCO, DEFENDANT-APPELLEE.

A petition for a rehearing having been filed herein by counsel for the appellant, United States of America,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifteenth day of March, one thousand nine hundred and seventy-seven.

76-1251
76-1252

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

JOHN MAURO, DEFENDANT-APPELLEE.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

JOHN FUSCO, DEFENDANT-APPELLEE.

A petition for rehearing containing a suggestion that the action be heard in banc having been filed herein by counsel for the appellant, United States of America, and no active judge or judge who was a member of the panel having requested a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ Irving R. Kaufman
IRVING R. KAUFMAN,
Chief Judge

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

75-CR-816

UNITED STATES OF AMERICA

—against—

JOHN MAURO, DEFENDANT

BARTELS, District Judge

In this proceeding the Court is confronted with the difficult question of interpreting a federal statute in a manner which, according to the express meaning, raises in the mind of the Court grave doubts as to whether its objectives could have been accomplished in a more practical manner. The facts appear as follows.

On December 12, 1974, the defendant, John Mauro, was sentenced to a term of imprisonment for three years to life by the State of New York. On May 7, 1975, while in the custody of the State of New York, he was subpoenaed to testify before a federal grand jury sitting in the Eastern District of New York and was produced pursuant to a Writ of *Habeas Corpus Ad Testificandum*. The defendant received a grant of immunity signed on May 12, 1975, by Judge Costantino. Subsequently, when the defendant re-

fused to answer questions before the grand jury, after having been ordered to do so by Judge Costantino, he was held in civil contempt and sentenced to a prison term of six months or the life of the grand jury, whichever was longer, upon the condition that he could purge himself by testifying at any time during the grand jury term. The defendant having continued his refusal to testify, the United States, on July 9, 1975, lodged a detainer against him at the Auburn Correctional Facility charging him with contempt of court, and thereafter on July 30, 1975, he was returned to the custody of the State of New York. On November 11, 1975, the defendant was indicted in the Eastern District of New York for criminal contempt of court in violation of 18 U.S.C. § 401.

Pursuant to a Writ of *Habeas Corpus Ad Prosequendum*, issued on November 5, 1975, the defendant was thereafter produced in the Eastern District on November 24, 1975, and on December 2, 1975, he was arraigned on the indictment and pled not guilty. On that date, to accommodate the defendant's counsel, the trial date was set for March 17, 1976, after the Court offered the dates of February 4, 1976, February 9, 1976, and March 3, 1976. On December 11, 1975, the defendant was again returned to state custody without having been tried on the charge of criminal contempt. Subsequently, on April 23, 1976, the defendant was again produced in Federal court pursuant to a Writ of *Habeas Corpus Ad Prosequendum*, issued on April 14, 1976, for the purpose of trial.

In 1970 Congress adopted, on behalf of the United States and the District of Columbia, the Interstate Agreement on Detainers, 18 U.S.C. Appendix ("Agreement"), which, along with similar enactments in thirty-nine states, provides a uniform procedure whereby each of the participating jurisdictions can readily obtain the presence of criminal defendants incarcerated in other participating jurisdictions. It is the interpretation of Article IV of the Agreement with which this Court is now concerned. However, to understand that Article, reference must be made to Article III which provides that when one jurisdiction files a detainer on a defendant incarcerated in another jurisdiction the existence of that detainer must be made known to the defendant who then has the option of demanding in writing a trial on the charges in the other jurisdiction forming the basis of the detainer. If the defendant makes such a demand to the proper authorities he must be transferred to the jurisdiction filing the detainer and must thereafter be tried within 180 days of the formal written demand or the indictment must be dismissed. Article IV provides that the jurisdiction filing the detainer may at its option request the custody of the defendant for the purpose of trial even if the defendant has not made a written demand for trial pursuant to Article III. In such event, however, a trial on the charges forming the basis of the detainer must, under Article IV(c), be commenced within 120 days of the defendant's arrival in the receiving jurisdiction. Article IV(e) further provides:

> "If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V (e), hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."

The defendant now moves for an order dismissing the indictment pursuant to Article IV(e) of the Agreement on the ground that the Government failed to try him on the federal charges before returning him to state custody in violation of that Article, and on the further ground that at the time he was held in civil contempt he was not advised of the Government's contemplated indictment for criminal contempt.

As set forth in Article I of the Agreement, the policy and purposes of the Agreement are to insure the speedy trial of a defendant subject to charges in another jurisdiction by way of a detainer, to eliminate the adverse effects upon programs of prisoner treatment and rehabilitation caused by uncertainty surrounding those charges, and to create cooperative procedures to secure the presence of defendants incarcerated in other jurisdictions. See also 3 U.S. Code Cong. & Adm. News 4864 (1970). More specifically, the Agreement was executed to eliminate the problem which arose when one jurisdiction tried, convicted and incarcerated a defendant and thereafter another jurisdiction lodged a detainer against the individual and simply waited to try the defendant after his release from the custody of the first jurisdiction. Often this procedure caused the delay of a trial for many years and, in addition, provided a Damoclean Sword over the defendant which would not only have an adverse psychological impact upon the defendant but would also impede the efforts of the incarcerating jurisdiction to rehabilitate the defendant since, among other things, it would render the defendant ineligible for probation or parole. *United States ex rel. Esola* v. *Groomes*, 520 F.2d 830, 836-7 (3d Cir. 1975); *United States* v. *Cappucci*, 342 F. Supp. 790 (E.D.Pa. 1972); 116 Cong. Rec. 14000 (1970). As indicated above, the predicate for the defendant's motion is the fact that he was produced in this Court on November 24, 1975 pursuant to a writ and was returned to state custody on December 11, 1975 without being tried.

I

In opposition the Government argues that when Congress adopted the Agreement on behalf of the United States it did so only as a sending state and not as a receiving state. Therefore it is argued that when the United States receives a state prisoner for the purpose of trial, it is not subject to the sanctions imposed by Article IV because it did not adopt the Agreement as a receiving state. In support of its position the Government asserts that the legislative history demonstrates that when Congress adopted the Agreement it was solely concerned with making a procedure available to the states for securing the

presence of federal prisoners so that the states could satisfy the speedy trial requirements of the Constitution as mandated by the Supreme Court in *Smith* v. *Hooey*, 393 U.S. 374 (1969), and *Dickey* v. *Florida*, 398 U.S. 30 (1970). Because a federal Writ of *Habeas Corpus Ad Prosequendum* issued pursuant to 28 U.S.C. § 2241 is valid legal process throughout the United States binding against the states for the purpose of obtaining custody of state prisoners for a federal trial, *Carbo* v. *United States*, 364 U.S. 611 (1961), the Government asserts that it was unnecessary for the United States to adopt the Agreement as a receiving state. Furthermore, it claims that Congress never intended to restrict the effect of 28 U.S.C. § 2241 or to alter the delicate federal-state relationship under the Supremacy Clause of the Constitution, Article VI. We cannot agree.

Nowhere in the text of the Agreement or in the prefatory enabling portions of its enactment is there any specific indication that the United States was becoming a limited participant as a sending state. In fact, the text itself suggests that the United States entered into the Agreement on the same terms as all other participating states. Article II(a) defines the term "State" to mean:

> "a State of the United States; *the United States of America*; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico." [Emphasis added.]

See *United States* v. *Cappucci*, *supra*. Article II(c) defines a "receiving state" as a "*State* in which trial is to be had on an indictment, information, or complaint pursuant to article III or article IV hereof." [Emphasis added.] Certainly under the express wording of the Agreement itself the United States is a receiving state and there is nothing in the Agreement excluding the United States from that status. In fact, for the purposes of an Article III request by a state prisoner for trial on federal charges the United States has been treated as a receiving state subject to the sanctions imposed by that Article. See *United States* v. *Mason*, 372 F.Supp. 651 (N.D. Ohio 1973).

Nor does the legislative history, which is sparse at best, alter this result. While it appears from the Senate Report that Congress was obviously responding to the need of the states for a procedure to secure the presence of federal prisoners in order to provide a speedy trial on their state charges and to escape the effect of the rulings in *Smith* v. *Hooey*, *supra*, and *Dickey* v. *Florida*, *supra*, the report also indicates that "the agreement shall enter into *full force and effect* as to a party 'State' when such State has enacted the same into law." [Emphasis added.] 3 U.S. Code Cong. & Adm. News 4864, 4866 (1970). Nowhere in the legislative history does Congress indicate that the United States is under any lesser obligation as a "State" than other states adopting the Agreement or that the Agreement has less than full force and effect against the United States as a "State" as that term is defined in the Agreement. In

fact, in a letter from Graham W. Watt, Assistant Commissioner of the District of Columbia, dated March 2, 1970, to Congressman Emanuel Celler, Chairman of the Committee on the Judiciary, which is included in the legislative history, it was stated that:

> "H.R. 6951, if passed, will also enable the Attorney General or his representative to have a prisoner against whom he has lodged a detainer for violation of an offense against the United States and who is serving a term of imprisonment in any party State made available for disposition of such detainer."

3 U.S. Code Cong. & Adm. News 4869 (1970). This statement demonstrates that it was anticipated that the United States would be participating in the Agreement as a receiving state as well as a sending state.[1] Moreover, the statute enacted was the "Interstate Agreement on Detainers" which was also enacted by thirty-nine other states. It is difficult to understand how the Federal Government could possibly become a party to such "Agreement" on its own

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[1] In referring to the possibilities applicable to the District of Columbia this letter made a distinction between the District prosecuting authorities and the Attorney General by asserting that the Agreement would also enable (1) District prisoners to require state authorities to try them on state charges, (2) state prisoners to demand a trial on charges arising out of the laws of the District, and (3) "District prosecuting authorities to have a prisoner in a party State made available for disposition of local detainers." 3 U.S. Code Cong. & Adm. News 4869-4870 (1970).

terms without the consent of the other states which were already bound to each other on different terms. It is true that the Government could enact a special statute limiting its obligation to that of a spending state but that is quite different from becoming a party to an agreement the terms of which have already been fixed by the other states.

The Government additionally contends that the congressional purpose of limiting the participation of the United States in the Agreement to a sending state is enunciated in § 3201(a) of the Criminal Justice Reform Act of 1975 (commonly referred to as "S-1") which was introduced in the Senate on January 15, 1975 and is still pending. That section provides:

> "(a) Adoption of Agreement by the United States—The United States, solely as a 'sending state,' and the District of Columbia are parties to the Interstate Agreement on Detainers . . . ."

In a report of the Committee on the Judiciary, United States Senate, on the provisions of S-1 the Committee in referring to § 3201(a) stated that the existing enabling act of the Agreement

> "has been amended to clarify the intent of Congress by providing that the Federal Government is a participant in the Agreement only in the capacity of a 'sending state.' Federal prosecution authorities and all Federal defendants have always had and continue to have recourse to a speedy trial in a Federal court pursuant to 28 U.S.C. 2241(c)(5), the Federal writ of *habeas corpus ad prosequendum*. The Committee does

> not intend, nor does it believe that the Congress in enacting the Agreement in 1970 intended, to limit the scope and applicability of that writ."

We find that for the purpose of determining the intent of the Ninety-First Congress in enacting the Agreement, both the provisions of S-1 and the Committee comments thereon are today irrelevant for the following reasons: (1) S-1 has not yet been enacted by Congress and may never be, (2) there is no assurance that the Congress as a whole will accept § 3201(a) as part of S-1 when and if it finally is enacted and (3) no subsequent Congress is in a position to express the intent of a previous Congress in enacting legislation.

Finally, we cannot lose sight of the fact that one of the express congressional purposes in adopting the Agreement was to ameliorate the adverse and disruptive effects upon rehabilitation programs caused by detainers and uncertainty over their ultimate disposition. Such effects are equally present when federal authorities receive state prisoners as when state authorities receive federal prisoners. Article IX of the Agreement provides that the Agreement be liberally construed so as to effectuate its purposes and such a construction would prohibit a differentiation between disruption of state and federal rehabilitation programs.

We conclude, therefore, that the United States is participating in the Agreement as both a sending

and a receiving state. In so concluding we are cognizant of the principle of statutory interpretation at times invoked by Judge Learned Hand where he observed under different circumstances that:

> "There is no surer guide in the interpretation of a statute than its purpose when that is sufficiently disclosed; nor any surer mark of over solicitude for the letter than to wince at carrying out that purpose because the words used do not formally quite match with it."

Federal Deposit Insurance Corp. v. *Tremaine*, 133 F.2d 827, 830 (2d Cir. 1943). See *Peter Pan Fabrics, Inc.* v. *Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960). But here it is apparent that Congress failed to foresee or consider, one way or the other, the particular problem presently before the Court and failed to express in the statute or its legislative history any intent to limit the participation of the United States. It is possible that if brought to its attention Congress would have adopted the Agreement solely as a sending state subject to the consent of the other states, but this is only speculation and we cannot undo what it has done. If the statute requires amending, Congress knows how to do it, as for example in S-1, but there is no basis for this Court to legislate under the guise of construction by limiting the participation of the United States to that of a sending state. *Dorszynski* v. *United States*, 418 U.S. 424, 442 (1974).

II

In the alternative the Government argues that no detainer for the criminal contempt indictment was ever lodged against the defendant and that he was produced on November 24, 1975 only pursuant to a Writ of *Habeas Corpus Ad Prosequendum* issued under 28 U.S.C. § 2241(c)(5) and not pursuant to the terms of the Agreement. The Government contends that having failed to invoke the provisions of the Agreement Article IV(e) is inapplicable and, accordingly, there is no basis for dismissing the indictment. We agree, however, with the reasoning of the Third Circuit in *United States ex rel. Esola* v. *Groomes, supra*, at 836-37, that whenever the Agreement is available for securing the presence of a defendant for the purpose of prosecution it is the exclusive means for doing so and the Government is charged with having invoked its provisions by use of the writ. See *United States* v. *Ricketson*, 498 F.2d 367, 373 (7th Cir. 1974). Any other result would provide an easy means for circumvention of the terms of the Agreement and render them meaningless.

Once the Government has obtained the custody of a defendant under the Agreement, it is subjected to two restraints: (1) the defendant must be tried within 120 days after arrival in federal custody, Article IV(c), and (2) the defendant must be tried before being returned to the custody of the state, Article IV(e). *United States ex rel. Esola* v. *Groomes, supra; United States* v. *Ricketson, supra.*

Here the defendant was returned to state custody before being tried under the apparent misapprehension that he could be returned for trial at any time after arraignment subject to compliance with the speedy trial requirements of the Court. The Government was simply in error in not remembering the terms of the Agreement.[2]

The Government having returned the defendant to state custody in violation of Article IV(e), the defendant's motion to dismiss the indictment must be and hereby is granted.

SO ORDERED.

Dated: Brooklyn, N.Y., May 17, 1976.

/s/ John R. Bartels
United States District Judge

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[2] It should be noted that by being compelled to retain a defendant in federal custody after arraignment the Government would be charged with the custodial expenses until it returned the defendant to the state which could exceed four months. See Article V(h) of the Agreement. A more practical solution would be an amendment to the Agreement permitting production of the defendant in the receiving state for arraignment, requiring return to state custody within 10 days and thereafter applying the requirements of Article IV(e).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 234264 3

No. 76-1596

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN MAURO AND JOHN FUSCO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1596

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN MAURO AND JOHN FUSCO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

Since the United States filed its petition for certiorari in this case, the conflict among the circuits on the question presented has deepened.[1] In recent decisions, the First Circuit and the Sixth Circuit have disagreed with the position of the Second Circuit in this case and have held that a writ of *habeas corpus ad prosequendum* is not a "detainer" making applicable the provisions of the Interstate Agreement on Detainers Act. *United States*

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[1]The question presented, as set forth in our petition (Pet. 2), is: "Whether a writ of *habeas corpus ad prosequendum* issued by a federal court to state authorities, directing the production of a state prisoner for trial on federal criminal charges, constitutes a detainer making applicable the terms and conditions of the Interstate Agreement on Detainers Act."

v. *Kenaan*, C.A. 1, No. 77-1014, decided July 7, 1977, petition for a writ of certiorari pending, No. 77-206; *Ridgeway* v. *United States*, C.A. 6, No. 76-2145, decided July 13, 1977, petition for a writ of certiorari pending, No. 77-5252. The Third Circuit, in two closely-divided *en banc* decisions, has taken the opposite view, aligning itself with the Second Circuit. *United States* v. *Sorrell*, No. 76-1647, decided August 22, 1977; *United States* v. *Thompson*, No. 76-1976, decided August 22, 1977. These decisions further demonstrate the need for a definitive ruling by this Court on this important issue.

For the reasons discussed in this memorandum and in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

SEPTEMBER 1977.

DOJ-1977-09

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1596

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN MAURO AND JOHN FUSCO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 13, 1977
CERTIORARI GRANTED OCTOBER 3, 1977

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1596

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN MAURO AND JOHN FUSCO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 75 CR 816

UNITED STATES OF AMERICA

v.

JOHN MAURO

DOCKET ENTRIES

Date	Proceedings
11-3-75	Before COSTANTINO J—Indictment filed.
11-5-75	Petition for Writ of Habeas Corpus Ad Prosequendum filed.
11-5-75	Writ Issued.
11-13-75	Before BARTELS, J.—Case called—deft present without counsel—case respectfully referred to Judge Costantino.
11-24-75	Before BARTELS, J.—case called—deft present without counsel—court interposes a plea of not guilty—status report set down for Dec. 2, 1975 at 9:30 a.m.
12-2-75	Before BARTELS, J.—case called—deft & atty S. Murphy present—trial set down for 3-17-76—certificate of engagement issued.
12-16-75	Writ retd and filed—executed.
3-2-76	Petition for writ of habeas corpus ad prosequendum filed—issued.
3-17-76	Before BARTELS, J.—case called—defts motion set down for 4-16-76—trial set down for 4-26-76 at 10:00 a.m.
3-19-76	Notice of motion to dismiss filed ret. 4-16-76.
4-14-76	Govts reply filed to defts motion to dismiss the indictment.
4-14-76	Govts notice of readiness for trial filed.
4-14-76	Petition for writ of habeas corpus ad prosequendum filed—issued.
4-23-76	Writ retd and filed—executed (Mauro).
4-26-76	Before BARTELS, J.—Case called—deft and counsel present—deft's motion to dismiss on ground of violation of interstate agreement on

Date	Proceedings
	retainers argued granted—indictment ordered dismissed—memorandum and order to follow.
5-5-76	Letter from A.U.S.A. Katz dated 5-5-76 filed.
5-6-76	3 transcripts filed one dated Nov. 24, 1975, one dated Nov. 13, 1975 and one dated Dec. 21, 1975.
5-6-76	Supplemental Brief filed in opposition to defts motion to dismiss indictment under Part IV(e) of the Interstate Agreement on Detainers.
5-17-76	By BARTELS, J.—Memorandum and Order filed dismissing indictment.
5-24-76	Notice of appeal filed by Govt.
5-24-76	Docket entries and duplicate of Notice mailed to the Court of appeals.
5-26-76	Stenographers transcript filed dated Mar. 17, 1976.
6-1-76	Record on appeal certified and mailed to court of appeals.
6-3-76	Order filed received from the court of appeals that the Record on appeal be docketed on or before 6-25-76.
6-7-76	Acknowledgment received from the Court of appeals filed for receipt of record on appeal.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 75 CR 819

UNITED STATES OF AMERICA
v.
JOHN FUSCO

DOCKET ENTRIES

Date	Proceedings
11-3-75	Before COSTANTINO J.—Indictment filed.
11-5-75	Petition for Writ of Habeas Corpus Ad Prosequendum filed.
11-5-75	Writ Issued.
11-13-75	Before BARTELS, J.—Case called—Pleading adjd to 11-17-75.
11-17-75	Before BARTELS, J.—Case called—deft and counsel present—case respectfully referred to Judge Judd for pleading.
11-18-75	By BARTELS, J.—Order appointing counsel filed.
11-24-75	Before BARTELS, J.—case called—deft & counsel John Corbett present—deft waives reading of the indictment and enters a plea of not guilty—status report set down for Dec. 2, 1975 at 9:30 a.m.
11-25-75	Writ retd and filed—Executed.
12-2-75	Before BARTELS, J.—Case called—deft and counsel present trial set down for 2-4-76 at 10:00 a.m.—certificate of engagement issued.
2-4-76	Subpoena to Testify etc. received from Chambers and placed in criminal folder.
3-2-76	Petition for writ of habeas corpus ad prosequendum filed—issued.
3-18-76	Before BARTELS, J.—case called—trial adjd to 4-29-76.
4-14-76	Govts Notice of readiness for trial filed.
4-27-76	Notice of Motion filed for dismissal (forwarded to Chambers).

Date	Proceedings
4-29-76	Before BARTELS, J.—case called—deft & atty present—defts motion to dismiss the indictment argued and granted—Memorandum and Order to follow.
5-5-76	Writ retd and filed—executed.
5-6-76	Three stenographers transcripts filed (placed in 75 CR-816) dated Nov. 13, Nov. 24 and Dec. 21, 1975 respectively.
5-6-76	Supplemental Brief in opposition to defts motion to dismiss indictment under Part IV(e) of the Interstate Agreement on Detainers.
5-10-76	Voucher for compensation of counsel filed.
5-13-76	Stenographers Transcript dated 4-29-76.
5-19-76	By BARTELS, J.—Order filed dismissing the indictment.
5-24-76	Govts Notice of appeal filed.
5-24-76	Docket entries and duplicate of Notice mailed to the Court of appeals.
5-26-76	Stenographers transcript filed dated Nov. 17, 1976.
6-1-76	Record on appeal certified and mailed to court of appeals.
6-4-76	Acknowledgment received from court of appeals for receipt of record.
6-7-76	Order filed that Index to Record on appeal be docketed on or before June 25, 1976.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

United States of America

v.

John Mauro,

Defendant

Indictment
18 USC § 401

The Grand Jury Charges:

COUNT ONE

On or about the 12th day of May, 1975 in the Eastern District of New York, JOHN MAURO, being then a witness before the Grand Jury of the United States District Court for the Eastern District of New York, having received a lawful order of a Court of the United States, in open court to wit: to proceed to the Grand Jury room to answer under a grant of immunity, the questions to be asked of him in the conduct of the Grand Jury proceeding, did unlawfully, wilfully and knowingly disobey the lawful order of the United States District Court for the Eastern District of New York, in that he refused to answer the questions asked of him in the course of the Grand Jury proceedings.

(Title 18, United States Code, Section 401).

A TRUE BILL

FORELADY

David G. Trager
United States Attorney
Eastern District of New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

United States of America v. John Fusco, Defendant	Indictment 18 USC § 401

The Grand Jury Charges:

COUNT ONE

On or about the 9th day of June, 1975, in the Eastern District of New York, JOHN FUSCO, being then a witness before the Grand Jury of the United States District Court for the Eastern District of New York, having received a lawful order of a Court of the United States, in open court to wit: to proceed to the Grand Jury room to answer under a grant of immunity, the questions to be asked of him in the conduct of the Grand Jury proceeding, did unlawfully, wilfully and knowingly disobey the lawful order of the United States District Court for the Eastern District of New York, in that he refused to answer the questions asked of him in the course of the Grand Jury proceedings.

(Title 18, United States Code, Section 401).

A TRUE BILL

FORELADY

David G. Trager
United States Attorney
Eastern District of New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

United States of America v. John Mauro	Petition for a writ of habeas corpus ad prosequendum No. 75 CR 816

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK:

The petition of Marsha Katz Special Attorney for the Eastern District of New York, respectfully shows to this Court that John Mauro now being detained in Auburn Correctional Facility, Auburn, N.Y. is charged, by an indictment filed against him in the Eastern District of New York, with violation of Title 18 United States Code, Section 401.

It is necessary that the said defendant John Mauro be brought to the United States District Court for the Eastern District of New York for trial before said United States District Court for the Eastern District of New York on the charges now pending against him.

WHEREFORE, your petitioner prays that a Writ of Habeas Corpus ad Prosequendum issue in this behalf directing that the said John Mauro be produced at the time and place set forth in said Writ, in civilian clothes, and that, after the said John Mauro shall have appeared in pursuance of said Writ, and at the termination of the proceedings in the said United States District Court for the Eastern District of New York on that particular day, he be returned immediately to the custody of the Warden, Auburn Correctional Facility, Auburn, N.Y., under safe and secure conduct.

Dated: Brooklyn, NY
November 5, 1975

Marsha Katz
SPECIAL ATTORNEY

EASTERN DISTRICT OF NEW YORK, SS:

MARSHA KATZ being duly sworn, says that he is the petitioner above named; that he had read the foregoing petition by him subscribed and knows the contents thereof; that the same are true of his own knowledge and belief.

Marsha Katz
SPECIAL ATTORNEY

Sworn to before me this 5th
day of November, 1977
Richard L. Shanley

Notary Public
State of N.Y. 30-3610090
Qualified Nassau
Term Expires 3-30-77

THE PRESIDENT OF THE UNITED STATES OF AMERICA

TO THE WARDEN, AUBURN CORRECTIONAL FACILITY, AUBURN, NEW YORK AND/OR TO THE UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF NEW YORK, AND/OR TO ANY OF HIS DEPUTIES, AND/OR TO ANY UNITED STATES MARSHAL

GREETINGS:

YOU ARE HEREBY COMMANDED to have the body of John Mauro now detained under your custody, as it is said, under safe and secure conduct, in civilian clothes, before the United States District Court for the Eastern District of New York, at the United States Courthouse, in such courtroom as shall be designated, in the Borough of Brooklyn, City, State and Eastern District of New York, on the 19th day of November at 10 o'clock in the forenoon of that day, for trial before said United States District Court for the Eastern District of New York upon an indictment filed in said Eastern District of New York against the said John Mauro charging him with violation of Title 18 United States Code, Section 401 and, at the termination of the proceedings in the said United States District Court on that particular day, that you return him forthwith to the Warden, Auburn Correctional Facility, Auburn, N.Y., under safe and secure conduct.

LET THE ABOVE WRIT ISSUE.

Dated: Brooklyn, NY
November 5, 1975

Mark A. Costantino
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF NEW YORK

Clerk USDC EDNY

By: _____
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

United States of America v. John Mauro	Petition for a writ of habeas corpus ad prosequendum No. 75 CR 816

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK:

The petition of Marsha Katz Special Attorney for the Eastern District of New York, respectfully shows to this Court that John Mauro #6689 now being detained in Auburn Correctional Facility, Auburn, N.Y., is charged, by an indictment filed against him in the Eastern District of New York, with violation of Title 18 United States Code, Section 401.

It is necessary that the said defendant John Mauro #6689 be brought to the United States District Court for the Eastern District of New York for trial before said United States District Court for the Eastern District of New York on the charges now pending against him.

WHEREFORE, your petitioner prays that a Writ of Habeas Corpus ad Prosequendum issue in this behalf directing that the said John Mauro, #6689, be produced at the time and place set forth in said Writ, in civilian clothes, and that, after the said John Mauro, #6689, shall have appeared in pursuance of said Writ, and at the termination of the proceedings in the said United States District Court for the Eastern District of New York on that particular day, he be returned immediately to the custody of the Warden, Auburn Correctional Facility, Auburn, N.Y., under safe and secure conduct.

Dated: Brooklyn, NY
April 14, 1976

Marsha Katz
SPECIAL ATTORNEY

EASTERN DISTRICT OF NEW YORK, SS:

Marsha Katz being duly sworn, says that he is the petitioner above named; that he had read the foregoing petition by him subscribed and knows the contents thereof; that the same are true of his own knowledge and belief.

Marsha Katz
SPECIAL ATTORNEY

Sworn to before me this 14th
day of April, 1976

Notary Public, State of New York
[Remainder illegible]

THE PRESIDENT OF THE UNITED STATES
OF AMERICA

TO THE WARDEN, AUBURN CORRECTIONAL FACILITY, AUBURN, NEW YORK AND/OR TO THE UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF NEW YORK, AND/OR TO ANY OF HIS DEPUTIES, AND/OR TO ANY UNITED STATES MARSHAL

GREETINGS:

YOU ARE HEREBY COMMANDED to have the body of JOHN MAURO, #6689, now detained under your custody, as it is said, under safe and secure conduct, in civilian clothes, before the United States District Court for the Eastern District of New York, at the United States Courthouse, in such courtroom as shall be designated, in the Borough of Brooklyn, City, State and Eastern District of New York, on the 23rd day of April, 1976 at 10 o'clock in the forenoon of that day, for trial before said United States District Court for the Eastern District of New York upon an indictment filed in said Eastern District of New York against the said John Mauro, #6689 charging him with violation of Title 18, United States Code, Section 401 and, at the termination of the proceedings in the said United States District Court on that particular day, that you return him forthwith to the Warden, AUBURN CORRECTIONAL FACILITY, AUBURN, NEW YORK under safe and secure conduct.

LET THE ABOVE WRIT ISSUE.

Dated: Brooklyn, NY
April 14, 1976

UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF NEW YORK

Clerk USDC EDNY

By: _____
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

United States of America v. John Fusco	Petition for a writ of habeas corpus ad prosequendum No. 75 CR 819

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK:

The petition of MARSHA KATZ, Special Attorney for the Eastern District of New York, respectfully shows to this Court that John Fusco, now being detained in Clinton Correctional Facility, Dannemora, N.Y., is charged, by an indictment filed against him in the Eastern District of New York, with violation of Title 18, United States Code, Section 401.

It is necessary that the said defendant John Fusco, be brought to the United States District Court for the Eastern District of New York for trial before said United States District Court for the Eastern District of New York on the charges now pending against him.

WHEREFORE, your petitioner prays that a Writ of Habeas Corpus ad Prosequendum issue in this behalf directing that the said John Fusco, be produced at the time and place set forth in said Writ, in civilian clothes, and that, after the said John Fusco, shall have appeared in pursuance of said Writ, and at the termination of the proceedings in the said United States District Court for the Eastern District of New York on that particular day, he be returned immediately to the custody of the Warden, Clinton Correctional Facility, Dannemora, N.Y., under safe and secure conduct.

Dated: Brooklyn, NY
November 5, 1975

Marsha Katz
SPECIAL ATTORNEY

EASTERN DISTRICT OF NEW YORK, SS:

MARSHA KATZ, being duly sworn, says that he is the petitioner above named; that he had read the foregoing petition by him subscribed and knows the contents thereof; that the same are true of his own knowledge and belief.

Marsha Katz
SPECIAL ATTORNEY

Sworn to before me this 5th
day of November, 1975
Richard L. Shanley

Notary Public
State of N.Y. 30-3610090
Qualified Nassau
Term Expires 3-30-77

THE PRESIDENT OF THE UNITED STATES
OF AMERICA

TO THE WARDEN, CLINTON CORRECTIONAL FACILITY, DANNEMORA, N.Y., AND/OR TO THE UNITED STATES MARSHAL FOR THE EASTERN DISRICT OF NEW YORK, AND/OR TO ANY OF HIS DEPUTIES, AND/OR TO ANY UNITED STATES MARSHAL

GREETINGS:

YOU ARE HEREBY COMMANDED to have the body of John Fusco, now detained under your custody, as it is said, under safe and secure conduct, in civilian clothes, before the United States District Court for the Eastern District of New York, at the United States Courthouse, in such courtroom as shall be designated, in the Borough of Brooklyn, City, State and Eastern District of New York, on the 19th day of November, 1975, at 10 o'clock in the forenoon of that day, for trial before said United States District Court for the Eastern District of New York upon an indictment filed in said Eastern District of New York against the said John Fusco, charging him with violation of Title 18, United States Code, Section 401 and, at the termination of the proceedings in the said United States District Court on that particular day, that you return him forthwith to the Warden, Clinton Correctional Facility, Dannemora, N.Y., under safe and secure conduct.

LET THE ABOVE WRIT ISSUE.

Dated: Brooklyn, NY
November 5, 1975

Mark A. Costantino
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF NEW YORK

Clerk USDC EDNY

By: _____
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

United States of America v. John Fusco	Petition for a writ of habeas corpus ad prosequendum No. 75 CR 819

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK:

The petition of Marsha Katz, Special Attorney for the Eastern District of New York, respectfully shows to this Court that John Fusco, now being detained in Clinton Correctional Facility, is charged, by an indictment filed against him in the Eastern District of New York, with violation of Title 18, United States Code, Section 401.

It is necessary that the said defendant John Fusco, be brought to the United States District Court for the Eastern District of New York for trial before said United States District Court for the Eastern District of New York on the charges now pending against him.

WHEREFORE, your petitioner prays that a Writ of Habeas Corpus ad Prosequendum issue in this behalf directing that the said John Fusco, be produced at the time and place set forth in said Writ, in civilian clothes, and that, after the said John Fusco, shall have appeared in pursuance of said Writ, and at the termination of the proceedings in the said United States District Court for the Eastern District of New York on that particular day, he be returned immediately to the custody of the Warden, Clinton Correctional Facility, under safe and secure conduct.

Dated: Brooklyn, NY
March 1, 1976

Marsha Katz
SPECIAL ATTORNEY

EASTERN DISTRICT OF NEW YORK, SS:

Marsha Katz, being duly sworn, says that he is the petitioner above named; that he had read the foregoing petition by him subscribed and knows the contents thereof; that the same are true of his own knowledge and belief.

Marsha Katz
SPECIAL ATTORNEY

Sworn to before me this 1st
day of March, 1976
Dianne [remainder illegible]

Notary Public, State of N.Y. 41-4617917
Qualified in Queens County, Expires 3-30-77

THE PRESIDENT OF THE
UNITED STATES OF AMERICA

TO THE WARDEN, CLINTON CORRECTIONAL FACILITY, AND/OR TO THE UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF NEW YORK, AND/OR TO ANY OF HIS DEPUTIES, AND/OR TO ANY UNITED STATES MARSHAL

GREETINGS:

YOU ARE HEREBY COMMANDED to have the body of John Fusco, now detained under your custody, as it is said, under safe and secure conduct, in civilian clothes, before the United States District Court for the Eastern District of New York, at the United States Courthouse, in such courtroom as shall be designated, in the Borough of Brooklyn, City, State and Eastern District of New York, on the 18th day of March, at 10 o'clock in the forenoon of that day, for trial before said United States District Court for the Eastern District of New York upon an indictment filed in said Eastern District of New York against the said John Fusco, charging him with violation of Title 18 United States Code, Section 401 and, at the termination of the proceedings in the said United States District Court on that particular day, that you return him forthwith to the Warden, CLINTON CORRECTIONAL FACILITY, under safe and secure conduct.

LET THE ABOVE WRIT ISSUE.

Dated: Brooklyn, NY
March 1, 1976

UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF NEW YORK

Clerk USDC EDNY

By: _____
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

United States of America
—against—
John Mauro,
Defendant.

Notice of motion
75 Cr. 816

SIRS:

PLEASE TAKE NOTICE that upon the annexed affirmation of STEPHEN G. MURPHY, the memorandum in support thereof, the indictment, and all the prior proceedings herein, the defendant JOHN MAURO will move this court before the Hon. Judge Bartels on March 17, 1976 at 10:00 A.M. or as soon thereafter as counsel can be heard in the United States Courthouse, 225 Cadman Plaza, Brooklyn, New York, for an order dismissing the indictment pursuant to the Interstate Agreement on Detainers Article IV(e) Pub.L. 91-538 §§ 1-8, December 9, 1970, 84 Stat. 1397-1403, and for such other and further relief as to this court seems just and proper.

Dated: Kew Gardens, New York
March 12, 1976

Yours, etc.

STEPHEN G. MURPHY
MURPHY, SADOWSKI & KOEHLER, ESQS.
Attorneys for Defendant
125-10 Queens Blvd.,
Kew Gardens, New York 11415
(212) 793-0200

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

United States of America

—against—

John Mauro,

Defendant.

Affidavit in support of motion

STATE OF NEW YORK
COUNTY OF QUEENS } ss:

STEPHEN G. MURPHY, being duly sworn, deposes and says:

1. I am an attorney at law, admitted to practice in this Court and a member of the law firm of Murphy, Sadowski & Koehler, Esqs., attorney for defendant JOHN MAURO.

2. The defendant was sentenced on December 12, 1974 in Supreme Court, Queens County, Criminal Term by the Honorable Rose L. Rubin, Justice of the Supreme Court, to a term of imprisonment of from three years to life.

3. As a prisoner of the New York State Department of Corrections, the defendant is serving his sentence at the correctional facility located at Auburne, New York. Except for the times that he has been produced in the Eastern District of New York, as will be hereinafter described, the defendant has continued to be a prisoner at Auburne.

4. Pursuant to a Writ of Habeas Corpus Ad Testificandum, the defendant was delivered into federal custody on May 7th, 1975 and subpoenaed to testify before a federal grand jury sitting in the Eastern District of New York.

5. An immunity order was signed May 12, 1975 by the Honorable Mark A. Constantino. The defendant was held in Civil Contempt by order of Judge Constantino on May 16, 1975 because of a proported refusal to obey his directive to testify before the grand jury, and sentenced to a term of six months, or the length of the grand jury, whichever was longer. The sentence was conditional and allowed the defendant to purge himself of the contempt. At no time on May 16, 1975 did Judge Constantino apprise the defendant of the fact that criminal contempt proceedings were contemplated to be brought against him. A copy of the minutes is annexed hereto as defendants Exhibit I.

6. After being sentenced, as described above, the defendant was detained at the federal detention facilities then located on West Street in Manhattan until he was returned into the custody of the New York State Department of Correction at Auburne, New York on July 30, 1975. At the time that he was received at the Auburne Correctional Facility the defendant was accompanied by a federal detainer dated July 9, 1975 charging contempt of court by an order of Judge Constantino on May 16, 1975.

7. The defendant remained at the Auburne Correctional Facility until November of 1975, at which time he was again produced in the Eastern District of New York, pursuant to a writ. The present indictment had been lodged against the defendant on November 5, 1975 charging Contempt of Court, in violation of T.18 USC Section 401. His production in the Eastern District of New York was for the purpose of prosecution under this indictment and in the month of December the defendant appeared with counsel before Judge Bartels and the matter was set down for trial on March 17, 1975. The defendant, however, was returned to the Auburne Correctional facility on December 11, 1975. During all this time the detainer dated July 9, 1975 continued to be lodged against the defendant. A copy of a letter from Mr. Robert J. Henderson, Superintendent at Auburne Correctional Facility dated December 15, 1975 is annexed hereto as defendant's Exhibit II, and indicates that the detainer was still lodged against the defendant on December 15, 1975.

8. On the above facts the defendant moves to dismiss the indictment against him on two grounds: first ground is that the defendant, pursuant to the Interstate Agreement on Detainers, was produced on November 12, 1975 in the Eastern District of New York for prosecution under the present indictment and that the defendant was transferred back to his place of imprisonment on December 11, 1975 without trial. This action is in direct contravention of the Interstate Agreement on Detainers Article IV(e) Pub. L. 91-538 §§ 1-8, December 9, 1970, 84 Stat. 1397-1403, which provides:

> "if trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, in-

formating or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."

9. Although rarely discussed, it seems as if there is no exception to the requirement that a defendant be tried before he is returned to the "sending jurisdiction." *U.S. ex. rel Escola* v. *Groomes* 520 F2d 830 (3rd circ. 1975). Moreover, the foregoing seems to be the case even when the defendant is produced by means of Writ of Habeas Corpus Ad Prosequendum. *U.S. Ex. Rel Esola, Supra.* In that case the relator alleged that on more than one occasion he had been produced from the custody of federal authorities into the custody of the State of New Jersey to stand trial, by means of a Writ. After having been produced on more than one occasion he was returned to the federal authorities. The court held that 1) the Interstate Agreement on Detainers is the exclusive means of transfer of prisoners to other jurisdictions for the purpose of trial, 2) That an indictment would be subject to dismissal with prejudice under Article IV(e) if trial is not held prior to a relator's return to the "sending jurisdiction."

10. The court's reason is persuasive. The purpose of Article IV(e) of the Interestate Agreement on Detainers is to minimize the adverse impact of a foreign prosecution on rehabilitive programs of the confining jurisdiction:

> "On a more practical level, an outstanding detainer may make a defendant ineligible for probation or parole or for some of the more desirable work assignments in prison. Also, if a defendant is uncertain as to whether he will have to serve another jail term he is less likely to have the motivation to become successfully rehabilitated. This latter consideration is especially important in view of the fact that the basic purpose of the entire penal system is to prepare its inmates to reenter society as law-abiding citizens" See also 116 Cong. Rec. at 13999."

U.S. ex. rel. Esola v. Groomes at 837 n. 21 (citing 116 Cong. Rec. 14,000 May 4, 1970).

11. At the present case the wisom of this propositon has borne true. Because of the fact of the detainer lodged

against the defendant, the defendant has been denied access, while incarcerated at Auburne, to privileges to which he would otherwise be entitled.

12. The defendant, therefore, moves to dismiss the indictment on the ground that he has been returned to the "sending jurisdiction" without having been tried on the present indictment. The defendant respectfully urges upon the court that a denial of this motion to dismiss would mean that the Interstate Agreement on Detainer "has wax teeth and is little more than a legislative exercise in futility". *People v. Esposito* 37 misc. 2nd 386, 201 NYS 2nd 83 at 88 (1960).

13. As second grounds for the defendant's motion, the defendant points to the fact that at the time that he was held in Civil Contempt by Judge Constantino on May 16, 1975, the court advised the defendant that a refusal of a directive to testify before the grand jury could, and would, result in a finding of Civil Contempt. At no time was it mentioned to the defendant that the court contemplated Criminal Contempt sanctions, or it possible that they might be applicable. That such sanctions were contemplated is indicated by the fact that when the defendant was returned to Auburne on July 9, 1975 he was accompanied by a federal detainer charging: Contempt of Court-Order J. Constantino 5/16/75. This is the detainer which is still lodged against the defendant and which is being apparently utilized for his production in the Eastern District of New York for trial under the present indictment.

14. The defendant contends that he was entitled to know on May 16, 1975 that any proported refusal to testify could not only be the subject of Civil sanctions, but also be accompanied by Criminal sanctions. *Yates v. U.S.* 227 F2 848 (9th circ. 1955). In that case the court held that:

> "the peculiar nature of proceedings for contempt permits temporary coercive measures followed by imprisonment for a fixed term as punishment. But, while the coercion is applied, the defendant in the criminal case is entitled to know that he may yet be subjected to a definite penalty for contempt and that the coercive restraint is not intended to relieve him of the punishment for the criminal refusals which he has already uttered". *Yates v. U.S. supra* at 850.

It might be argued that the present case differs from that of *Yates, supra* in that in Yates there was involved a defendant who refused to testify as to certain matters after having taken the stand in her own defense. The defendant contends that in the present indictment he was no less a defendant when the court advised him of its intention to hold him in Civil Contempt. The notions inherent in due process of law should not permit a court to advise a defendant that he may be held in Civil Contempt and then to hold the defendant in criminal Contempt without warning after he has been held in Civil Contempt.

WHEREFORE, the defendant prays for an order dismissing the indictment pursuant to the Interstate Agreement on Detainers Article IV(e) and because at the time he was held in Civil Contempt he was not informed that Criminal sanctions could and would be imposed upon him.

Dated: Kew Gardens, New York
March 12, 1976

STEPHEN G. MURPHY

Sworn to before me this
day of March, 1976.

[Exhibit I]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA —against— JOHN MAURO, DEFENDANT.	United States Courthouse Brooklyn, New York May 16, 1975 10:00 o'clock a.m.

Before:

HONORABLE MARK A. CONSTANTINO, U.S.D.J.

ILENE GINSBERG
OFFICIAL COURT REPORTER

[2] Appearances:

DAVID G. TRAGER, ESQ.,
United States Attorney
for the Eastern District of New York

BY: MARSHA KATZ, ESQ.,
Assistant U. S. Attorney

STEVEN MURPHY, ESQ.,
Attorney for Defendant.

[3] MR. MURPHY: Good morning, your Honor.

MS. KATZ: Good morning, your Honor.

Your Honor, I apologize to the Court. I did not check this morning to make sure Mr. Mauro was present.

THE COURT: We'll call down and see if he is there.

(Recess taken.)

(After recess.)

THE COURT: All those with no business before the Court will please leave.

(Whereupon all spectators exited the courtroom.)

MS. KATZ: Your Honor, Mr. Mauro appeared before you this Monday, May 12th at which time you signed an order requiring that he testify before the Grand Jury.

At that time Mr. Mauro was taken up to the Grand Jury

at which time he refused to answer any questions addressed to him.

We then again appeared before you with the Grand Jury Reporter and the Foreman of the Grand Jury. At that time you ordered Mr. Mauro to answer the questions asked by the Government.

We then returned to the Grand Jury at which time Mr. Mauro again refused to answer any questions [4] addressed to him.

We then returned to this courtroom and you set today as a hearing date on an order for holding Mr. Mauro in civil contempt.

THE COURT: Yes.

MR. MURPHY: Well, your Honor, Mr. Mauro informed me that under the circumstances he did not feel that answering any questions in the Grand Jury would be of any benefit to him; that he had previously made certain statements to Ms. Katz in the presence of Government witnesses and that he felt that his answers would be unsatisfactory to them and might make him liable for a perjury charge.

He therefore chose not to answer the questions at that time.

THE COURT: He still refuses at this time?

MR. MURPHY: He informs me he will make up his mind when he gets into the Grand Jury. He has not yet made up his mind at this time. He probably will not answer but he would make up his mind when he gets there and would like some time to think it over.

MS. KATZ: Our Grand Jury—it's my understanding that our Grand Jury is not sitting today but the United States Attorney's Grand Jury is sitting and if it is his desire we can can place him before that [5] Grand Jury.

THE COURT: Does he want at this moment, the opportunity to go before the Grand Jury and give testimony?

MR. MURPHY: He will go before the Grand Jury but he does not desire to go before it.

MS. KATZ: I am offering Mr. Mauro the opportunity to testify before the Grand Jury.

MR. MURPHY: Judge, he doesn't want to testify before the Grand Jury.

THE COURT: Today or any other day?

MR. MURPHY: At this time.

MS. KATZ: At any time Mr. Mauro will change his mind

the Government is ready and prepared to put him before a Grand Jury. But, we request, until that time, that he be held in contempt.

THE COURT: You do not desire to go before the Grand Jury?

MR. MAURO: No.

MS. KATZ: You understand there is a Grand Jury that is sitting today and you can go before them.

MR. MAURO: I do not wish to.

THE COURT: If brought before that Grand Jury sitting today and being given an opportunity to answer questions propounded by the Government, would you answer [6] those questions?

MR. MAURO: No, your Honor.

THE COURT: You understand that by taking the position you are taking that you can now be held in civil contempt?

MR. MAURO: Yes.

THE COURT: Do you wish to reflect for one more moment as to the problems that civil contempt will impose upon you?

MR. MAURO: No.

THE COURT: You still wish at this time then to state to the Court that you will not go before the Grand Jury?

MR. MAURO: Yes, your Honor.

THE COURT: Now, do you know any legal reason why he should not be held in civil contempt at this time after the Court has interrogated him?

MR. MURPHY: No.

THE COURT: The Court will hold Mr. Mauro in civil contempt for six months or the length of the Grand Jury, whichever is longer, with the proviso in the event he changes his mind he can advise the Department of Justice attorney and he can be brought before the Grand Jury.

MR. MURPHY: Is your Honor directing that he [7] be lodged in a federal facility? He is in state custody.

THE COURT: No. There will be a federal detention and the time will not be stayed.

MR. MURPHY: I question the validity of what your Honor is doing. The law is that a state sentence can be tolled in only one of two ways and this is not one of the two ways.

THE COURT: You have to take that up with the state authorities.

MR. MURPHY: Oh, yes. I will.

• • •

[Exhibit II]

December 15, 1975

U. S. Marshal
Mr. Frank M. Dulan
Post Office Box 418
Utica, New York 13503

RE: John MAURO AU#66689

Dear Sir:

The above-named inmate is presently incarcerated at Auburn Correctional Facility.

When he was received at this facility, he was accompanied by a Federal Detainer, dated 7/9/75, charging: Contempt of Court—Order J. Costantino (5/16/75).

The inmate is interested in having this Detainer disposed of.

Would you kindly check your records to see if this Detainer is still active, or whether the matter will be taken care of in the near future.

Thank you for your cooperation in this matter.

Very truly yours,
ROBERT J. HENDERSON
Superintendent
/s/ Elaine Graves (kms)
ELAINE GRAVES
Head Clerk

kms
cc: J. Mauro, AU # 66689

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
—against—
JOHN FUSCO,
DEFENDANT.
75-CR-819

United States Courthouse
Brooklyn, New York
November 17, 1975
9:30 o'clock A.M.

Before:

HONORABLE JOHN R. BARTELS, U.S.D.J.

BURTON SULZER
OFFICIAL COURT REPORTER

[2] Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York
BY: ALAN SHLEPPIN, ESQ.

—and—

MARSHA KATZ, ESQ.
Assistant U.S. Attorneys

John FUSCO
Pro Se

Also present:

EDWARD C. MONTELL

• • •

[3] THE COURT: • • • Was he before the State Court?
MR. MONTELL: Yes.
THE COURT: In a criminal matter?

MR. MONTELL: In a criminal matter, sir, yes, he's presently incarcerated, sir, and the matter before your Honor emanated from a Grand Jury proceeding.

• • •

[4] THE DEFENDANT: I don't understand, because last time I was in front of a judge—

THE COURT: What judge?

THE DEFENDANT Judge Judd, and I was told I was in civil contempt • • •.

THE COURT: You are still under civil contempt. • • •

• • •

[8] MS. KATZ: The Grand Jury under which he was brought before is still sitting, your Honor, and will sit until May of this year.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	
—against—	
JOHN MAURO	75 CR 816
ROBERT SMITH	75 CR 817
ROBERT MARINO	75 CR 818
JOHN FUSCO	75 CR 819
DEFENDANTS	

United States Courthouse
Brooklyn, New York

November 24, 1975
9:30 a.m.

Before:

HONORABLE JOHN R. BARTELS, U.S.D.J.

SHELDON SILVERMAN
Court Reporter

[2] Appearances:

DAVID G. TRAGER, Esq.
United States Attorney
for the Eastern District of New York

By: MARSHA KATZ, Esq.
Special Attorney

RICHARD ROSENKRANZ, Esq.
Attorney for Defendant Smith

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[9] THE COURT: • • • Mr. Fusco, you've met Mr. Corbett, your lawyer?

[10] DEFENDANT FUSCO: Yes, your Honor.

THE COURT: What's your plea?

MR. CORBETT: Not guilty, sir.

• • •

[11] MR. CORBETT: Just one thing, Judge. The defendant reminded me. We had a conference on Friday. He told me that the authorities at the M.C.C. are keeping him and his co-defendants on this matter on separate floors. They're not allowing them to meet.

THE COURT: Is there any objection to that?

MR. CORBETT: Well, his objection is that he wishes to discuss his case with his co-defendants with a view to preparing for trial.

THE COURT: I don't believe there's any right at all that I know of that a prisoner can demand to speak to other prisoners. I don't know of any such right.

MS. KATZ: In light that this is a criminal contempt stemmed out of grand jury proceedings by its very nature are secretive, I don't think it would be appropriate.

THE COURT: I can't give you relief on that.

MR. CORBETT: I'll write to the warden of the M.C.C.

THE COURT: You're not getting my court order.

MR. CORBETT: I realize that.

• • •

[15] DEFENDANT FUSCO: Yes, your Honor, but now I went in front of Judge Judd and I was given six months on a civil contempt. Now I went back to Clinton—Danamora.

THE COURT: You didn't serve the six months because you're serving the State.

[16] DEFENDANT FUSCO: I don't know what you mean by not serving it. Because of the six months I was denied all privileges up in Clinton.

THE COURT: He ordered you again to serve.

DEFENDANT FISCO: No.

MS. KATZ: I don't know why he's saying he was ordered to serve six months. The order for Mr. Fusco states that he's to be released in custody until, for the life of the Special May 1974 Special Grand Jury, which is still presenting, sitting, or until such time as he purges himself of this contempt. I don't know where this six months comes in. • • •

• • •

[18] DEFENDANT FUSCO: I'm still totally confused whether or not I was sentenced.

THE COURT: Even if you were, that was on the civil case. This is a criminal matter. You're not prevented from being prosecuted criminally. Mr. Corbett will tell you.

• • •

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	
against	
JOHN FUSCO	75 CR 819
ROBERT MARINO	75 CR 818
ROBERT SMITH	75 CR 817
JOHN MAURO	75 CR 816
Defendants	

United States Courthouse
Brooklyn, New York

December 2, 1975
9:30 a.m.

Before:

HONORABLE JOHN R. BARTELS,
U.S.D.J.

SHELDON SILVERMAN
Court Reporter

[2] Appearances:

DAVID G. TRAGER, Esq.
United States Attorney for the
Eastern District of New York

By: MARSHA KATZ, Esq.
Assistant U.S. Attorney

JOHN CORBETT, Esq.
Attorney for Defendant Fusco

IRA COOPER, Esq.
Attorney for Defendant Marino

RICHARD ROSENKRANZ, Esq.
Attorney for Defendant Smith

STEPHEN MURPHY, Esq.
Attorney for Defendant Mauro

[3] THE CLERK: Criminal cause status report, United States versus John Mauro, Robert Smith, Robert Marino, and John Fusco.

THE COURT: Good morning, gentlemen.

You understand the nature of these indictments? The question is, I suppose, whether they should all be tried at the same time or separately.

MS. KATZ: I've done research of the question that you had raised the last time as to the joinder of offenses. Under U.S. v. Gentile, 60 F.Res. 686, District Court case from this district, a case out of our office—

THE COURT: Federal Reserve decision? I never heard of that.

MS. KATZ: I'm sorry. Federal Rules decision, District Court case out of this district, 686. It tends to suggest under that decision that it would be improper on this case, although it would seem that the acts of the defendants arose out of the same series of transactions they were really independent. They were each called to the same grand jury, each asked the same series of questions, yet the contempt itself was individual of each other.

THE COURT: That doesn't offer too much of a problem. We'll try them one after each other. [4] I would think it would be up to the defendants. You would probably want all separate trials, do you?

MR. MURPHY: That's correct.

THE COURT: Four trials. We'll give it to you. Who wants to go first? Don't all raise your hands.

MR. MURPHY: I'm starting a trial next week in front of Judge Neaher.

THE COURT: How are you fixed for the trials of these cases?

MS. KATZ: I have three trials set for January. It would have to be either fairly soon or in February.

THE COURT: I don't have any trials, you know.

MS. KATZ: I'll give you some of mine, your Honor.

THE COURT: My books are clean, just waiting for these cases.

Do you want it in February?

MR. COOPER: Yes.

MR. ROSENKRANZ: Yes.

MR. MURPHY: It's not good for me. I'm on trial before Judge Mishler.

THE COURT: Something has to be good for you. You'll try the first one in December. You can't do [5] that? I'm giving you your pickings now. You can't go too far with this.

MR. MURPHY: January would be good for me. I'm starting a trial before Judge Neaher next Monday.

THE COURT: You're starting a trial here one of these days. You'd better put that down.

I'll give you a certificate. You can't start all those trials.

MS. KATZ: If you can give us an approximation of how long your trial before Judge Neaher will last?

MR. MURPHY: A week to ten days.

MS. KATZ: I begin a trial on the 5th of January before Judge Platt. Would it be possible to try it before that and the remaining three in February?

THE COURT: I would like to take these one, two, three, four. I would like to go right straight through, but that's not necessary. We can't— Can we do much before February? I'm going to be away a week in February. Let there be no doubt about that. We only have one day open in February?

Do you have anything in January?

We can fit one or two the week of February 2nd. I have the form for February.

MS. KATZ: All four cases?

[6] Your Honor, who do you want to go on the 4th of February?

THE COURT: Mr. Corbett is ready.

MR. CORBETT: Yes, I'll go, with Mr. Fusco.

THE COURT: How about the 9th of February? How about you, Mr. Rosenkranz— No, we'll take Mr. Cooper.

MR. COOPER: Yes, Judge?

THE COURT: The 9th.

MR. COOPER: February 9th.

THE COURT: It has to be finished soon.

MS. KATZ: You represent Mr. Marino?

MR. COOPER: That's correct.

THE COURT: These are not going to last more than one day?

MS. KATZ: I don't expect the presentation of the Govern-

ment's case, certainly no more than a day and a half, your Honor.

THE COURT: Now we've got two of them. Now we have to go to March for the other ones, gentlemen.

Wednesday, March 3rd?

MR. MURPHY: The only problem I have there—

THE COURT: You've got a lot of problems.

MR. MURPHY: I'm starting a trial in front [7] of Mishler on the 23rd of February. Probably I'll be finished by then, but I prefer—

THE COURT: How many defendants?

MR. MURPHY: Four defendants, Judge.

THE COURT: Do you think it will last longer than a week?

MR. MURPHY: It could.

THE COURT: Who's ready for March 3rd?

MR. ROSENKRANZ: March 3rd is fine, your Honor.

THE COURT: We need one more. This one you are going to get. March 17th, Mr. Murphy? You won't march in the parade that day, Mr. Murphy.

MR. MURPHY: Very well, Judge.

THE COURT: We'll give you all certificates.

Gentlemen, I'll mail them to you.

MR. ROSENKRANZ: Can we defer talking to the defendants here? Last time they wanted to return.

THE COURT: We have to be fair to the warden. You can't stay from December to March 17th. Miss Katz, they have a lot of problems over there. It's overcrowded.

MS. KATZ: The Government is willing to do whatever you direct us to do. We'll either send them back or writ them down.

THE COURT: Writ them down. You can leave [8] them here a week and writ them down.

MS. KATZ: When would you like them to return, three or four days before the trial?

THE COURT: Three or four days before the trial, yes. We can't keep them here.

• • •

[10] MR. COOPER: Rather than get these people back from the institution, of course with their consent, I speak on behalf of Robert Marino, would it be possible to have him remain at the institution at least until the beginning of January?

THE COURT: I have no objection except that Warden Jensen has need for all that space in there for detainees before trial. It's just unfair. These men are going to be there for a long time. They're already in jail; is that true?

MR. COOPER: That's correct.

THE COURT: I'm not going to do it. The answer [11] is I give you a week before they come to trial.

MR. CORBETT: Mr. Fusco has expressed a desire to go back to Danamora at this time, if your Honor can satisfy his writ.

MS. KATZ: We will have him writted down February 1st for the February 4th trial, unless you want a different date.

MR. CORBETT: I'll be in touch with you in January.

MS. KATZ: Other than Mr. Fusco, we will keep Mr. Marino, Mr. Smith and Mr. Mauro here one week from today, I believe, and then we will bring them back—

THE COURT: Unless they want to come down sooner.

MS. KATZ: Very well.

You wanted to determine whether they can stay, whether it's permissible for them to stay here?

MR. MURPHY: If the warden has no objection, can they stay?

THE COURT: Call him up and tell the warden if he has any objection, they'll go. If he's not crowded, I have no objection, of course, if it's not too crowded for them to stay. If it's crowded, he has no room, they go. That's simple. You can pick [12] up a phone. I can do it myself, but there's no problem here. That's done all the time.

MS. KATZ: I'd be happy to call the warden.

THE COURT: It's a chance to get more experience. Call the warden of the prison.

MS. KATZ: I would ask for the record that the other three defendants express on the record their desire, if the warden concurs.

MR. ROSENKRANZ: Mr. Smith prefers to remain in the M.C.C.

MR. MURPHY: As does Mr. Mauro.

MR. COOPER: Mr. Marino joins in that request.

THE COURT: I can well understand; it's a lovely spot. People are breaking in instead of breaking out.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

—against—

JOHN MAURO,

Defendant.

United States Courthouse
Brooklyn, New York

March 17, 1976
10:00 o'clock A.M.

Before:

HON. JOHN R. BARTELS, U.S.D.J.

HENRI LE GENDRE
Acting Official Court Reporter

[2] APPEARANCES:

DAVID G. TRAGER, ESQ.,
United States Attorney
for Eastern District of New York

BY: M. KATZ

KEVIN ROSS, ESQ.,
Attorney for Defendant

[3] THE CLERK: Criminal Cause for Trial, United States of America vs. John Mauro.

MR. ROSS: I'm appearing for Mr. Mauro.

THE COURT: Are you a member of the Bar?

MR. ROSS: In this Court I've not been admitted.

THE COURT: You can't appear to try a case. You could appear here this morning, of course, but I would suggest you become a member.

Now, what were you going to say?

MS. KATZ: I was just going to say that you had indicated to myself and I indicated to Mr. Murphy that you would not be able to try this case this morning.

THE COURT: No point, he didn't have to come for this purpose.

MS. KATZ: I understand.

THE COURT: I'm trying this case, the jury is here now.

MS. KATZ: Did you want to adjourn it? There is a problem with six months rule. I don't believe Mr. Mauro—

THE COURT: He won't suffer too much.

MS. KATZ: He's incarcerated not in this case, but the speedy trial act would run as of [4] May 3rd and I don't believe there was ever any discussion with the defendant about the possibility of it not being tried in the six months.

THE COURT: You are right. I can only say this is only going to take a day; isn't it?

MR. ROSS: Could I point out for the record that a detainer has been lodged against the defendant since June of last year. There might be some sort of a speedy trial problem.

MS. KATZ: I think we have already disposed of the issue when the six months begins to run and it had begun to run at the point of indictment in this case under 18USC41—

THE COURT: Any question about speedy trial you better either tell me whether you're going to waive it or not. I'm certainly not going to let this case slide off on any technicality.

MR. ROSS: It's my understanding that this adjournment was by consent and would be excluded under the detainer agreement.

THE COURT: Was it by consent?

MS. KATZ: I believe that this was the date that was mutually agreeable.

THE COURT: When can we try this case?

LAW CLERK: April 26th.

[5] THE COURT: You find out whether there will be any speedy trial question raised here before April 26th. If it is, I will bring him in.

MR. ROSS: If I may be heard.

THE COURT: It's only one day, and I have these other matter pending.

MR. ROSS: There will be a question raised under the detainer agreement.

THE COURT: Speedy trial because you say it begins on—

MR. ROSS: He was returned to his original place in Auburn, New York and detained there.

THE COURT: There is no determination in this case at all. I don't know what you are talking about.

MR. ROSS: If a defendant is returned to his original place of incarceration before final disposition where he's produced on detainer, the indictment must be dismissed and the defendant will make a motion.

THE COURT: You better make your motion right away.

MR. ROSS: I have the papers today but they haven't been endorsed.

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[6] THE COURT: I want to know whether there is any speedy trial issue before that that's going to be raised. We'll try the case if we have to stay at night, immediately.

MS. KATZ: I would then suggest, if they are going to raise any speedy trial issue, I would have [7] Mr. Mauro brought down. He should be present during that. I don't believe that counsel can necessarily waive it on his behalf, although I imagine it might be possible.

THE COURT: You find out whether there is any speedy trial issue involved.

MS. KATZ: It's the Government's position that there is no speedy trial issue. If Mr. Ross and Mr. Mauro want to raise it then I would suggest that they raise it.

THE COURT: They can waive it without bringing him down, providing they call him up.

MS. KATZ: If they have discussions with him and they certify that they have explained his rights.

THE COURT: He certainly is not being subjected, it seems to me, to any hardship, but that's not what the rule says.

MR. ROSS: The real prejudice I believe, that the defendant is being subject to is while he's being incarcerated, that the detainer has been lodged against him.

THE COURT: That's another matter. You make a motion on that, but that doesn't have anything to do with the speedy trial, does it?

[8] MR. ROSS: No, Judge, but the detainer agreement says a trial must be had within a certain month after production.

THE COURT: That's the basis of your motion.

MR. ROSS: I don't see any question there. He was produced November 12th.

THE COURT: And the trial was to be in four months after

production. You have four, five others in the same category.

MS. KATZ: I would hesitate to comment about the defendant's motion since I'm not clear exactly on the basis which they are making it, but I would suggest the fact that Mr. Mauro was produced and at that time the trial date of March 17th was set with both Mr. Mauro present and counsel; at that time there was no objection to that date. Specifically, Mr. Mauro to be returned to the State, for whatever reason, as he did not want to be held in Federal Correctional Facility, so I think any objection he might have whether it be legally or not, it was waived when he himself was present at the March 17th setting of the date.

THE COURT: Maybe he can't waive it, I don't know.

MR. ROSS: My understanding of the law is [9] that he cannot waive it.

THE COURT: You find out whether this delay from March 17th to April 26th is going to prejudice either side one way or the other. I'll make it a point to have the trial before that, much sooner.

• • •

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA —against— John Mauro, Defendant.	75-CR-816

United States Courthouse
Brooklyn, New York

April 26, 1976

Before:

HONORABLE JOHN R. BARTELS, U.S.D.J.

HARRY RAPAPORT
ACTING OFFICIAL COURT REPORTER

[2] Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: MARSHA KATZ, ESQ.
Assistant U.S. Attorney

ROBERT SADAWSKI, ESQ.
Attorney for the Defendant

[3] THE COURT: All right, I will listen to the argument.

MR. SADAWSKI: Your Honor, its the position of the defendant on this application—

THE COURT: You will have to talk louder.

MR. SADAWSKI: It is the position of the defendant on this application to dismiss the pending indictment for criminal intent for two reasons:

One, that we have an existing agreement, the Interstate agreement on detainers, and we believe that agreement, which is binding on the State of New York and the Federal Government, has been violated and that the failure of the

Government to comply with that agreement is ground for and makes the indictment susceptible to being dismissed.

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THE COURT: • • •

[5] However, I am considerably bothered of the fact that this defendant was returned without being tried as required by the Interstate agreement on detainers.

One thing that does stick out, however, is that he asked to be returned. He didn't want to stay at the Metropolitan Correctional Center. Is that right?

MR. SADAWSKI: Your Honor, to that end I have just had a discussion with the defendant to straighten out my own beliefs what happened on that date and he had asked me to relate to the Court that he will testify on that matter, that he did not request to go. And quite to the contrary, not for any legal reasons, for altruistic reasons, but for his own reasons. His grandmother was sick, the holidays were approaching and the visitation was ten times more liberal in the Federal detention here, that he preferred to be here. And the Government shipped him away. He had made [6] application to go to a hospital and a funeral subsequent to that based on the sickness of his grandmother, which became part of the reason he wanted to stay here in the first place, I'm not saying for a legal reason but it turned out because of circumstances, a quirk of circumstances, that he wanted to stay here.

MS. KATZ: My recollection was the same as the Court's. I have attempted to get a copy of the transcript of those proceedings and have not been successful to that end.

I think in terms of the issues the Interstate Agreement on Detainers, I believe on Mr. Mauro's counsel missed one important point. I realize there is a Third Circuit case contrary to the Government's position, nevertheless I believe he was not produced pursuant to this agreement. And it is not an automatic thing.

THE COURT: Your argument is that he is entitled to a writ?

MS. KATZ: Yes. This is a significant argument, I believe.

THE COURT: Then, of course, that would make the Interstate Agreement on Detainers meaningless.

MS. KATZ: No, your Honor. I don't believe that's the case.

[7] For example, if a state wishes to get a prisoner from the Federal Government they may issue a writ and the Bureau of Prisons may out of accommodation honor it. And the state has no power in which to enforce that writ. They may say, "I'm sorry, we will not turn him over."

THE COURT: You mean to say if the Federal Government issued a writ and the state would not observe that writ?

MS. KATZ: No, your Honor. If the State Court—

THE COURT: This is not a State Court proposition. This is a Federal Court.

MS. KATZ: Yes, your Honor. But I believe that was the purpose of the Interstate Agreement, to give a procedure by which a state may get a prisoner from the Federal Courts.

THE COURT: Nothing in the legislative history indicates anything of that at all.

MS. KATZ: I think the legislative history is very skimpy in this case.

THE COURT: It is skimpy.

MS. KATZ: It is unfortunate the full purpose of this act was never fully discussed. But I think the legislative history is not totally void of any discussion on this point.

[8] The statements made by the Attorney General and the Bureau of Prisons speak for the fact that there are many Federal prisons for which there are State detainers lodged against them. They also speak about the fact that there is no way for the State to get these prisoners.

THE COURT: You're arguing for the State. I don't believe you have any—you are a United States Attorney. You may argue for the Government. You are not in a position to complain because the State will have to obey the writ issued by the Federal Government.

MS. KATZ: I admit the fact that if a Federal District Court Judge orders a state officer to do an act, that that officer will have to comply. Nonetheless, that's not the issue before the Court.

The issue before the Court is the Interstate position on detainers. It's the Government's position that this, not by the issuing of a writ automatically invoking the procedures of this act, that that was not the purpose and that is not what was meant. That unlike the State, the Federal Government did have a procedure by which it can get the custody of

the prisoner. Nonetheless, it entered into it to give the State a corresponding right it did not have.

And now to say every time we use the inherent [9] power of the Court to request the presence of an individual we are automatically invoking an agreement, not known at the time that the writ was signed by the Court or by myself.

THE COURT: What do you mean by that? I wasn't supposed to know? I wasn't trying the case, you're trying the case?

MS. KATZ: I am aware, your Honor, of the fact that the Government is supposed to have knowledge of all statutes, acts and various criminal law involving any case that it comes before. Nonetheless, it was not the intention of the Government, nor I believe the intention of the Court, at the time the writ was executed.

THE COURT: It was certainly not the intention of the Court to do so under the agreement and you have a case in the Third Circuit facing it. This may be a case where Congress may be importuned to make changes of the act. But I don't know how the Court can escape imposing it.

MS. KATZ: Judge, I don't think Congress meant the result that—

THE COURT: You have two problems here. First is the fact that you returned the prisoner. And the second is that maybe if you didn't return him, have [10] you tried him in the 120 days.

MS. KATZ: At the time you offered various dates to the defendant.

THE COURT: Yes, March 17th was one.

MS. KATZ: Yes. And there were two earlier dates and Mr. Murphy indicated the fact that he was unavailable.

THE COURT: Maybe you can exclude the time and that would bring us up to Wednesday.

MS. KATZ: Your Honor, I was prepared to try it on the 17th of March and I am prepared to try it today also.

MR. SADAWSKI: May I be heard briefly, your Honor?

THE COURT: Yes.

MR. SADAWSKI: The method of invoking the Interstate Agreement, whether by a writ or by some form pursuant to the statute does not change the ramifications of whence the Federal Government has custody.

Miss Katz has raised a point not relevant here. We are

not so much concerned of how you got them. The statute doesn't say if you use a writ ad testifcamdum it's okay. One says on those exceptions, you have a charge and indictment, he has been arraigned on the [11] indictment and you must try him before you send him back. It doesn't raise the situation of how he got to your custody, but—

THE COURT: Mrs. Katz, I understand your position and I don't necessarily understand the Congressional posture. They say you have interrupted the rehabilitative procedures of Mr. John Mauro and he would have been much further rehabilitated were it not for the fact that you sent him back. You can see that by looking at him.

[12] MR. SADAWSKI: We have some documentary proof in that area.

THE COURT: I bet.

MR. SADAWSKI: We have denials of drug transfer programs and—

THE COURT: Mrs. Katz, you just have to sometimes face up to some of the bizarre and queer statutes that we are faced with. It is a sad situation because I don't think they think too deeply down there, but nevertheless here is the statute.

I have to rule that under the Interstate Agreement on detainers and when the Government requests the presence of a defendant for the purpose of trial, the Government must, one, try the defendant within 120 days of his arrival in federal custody as extended by the Court with the consent of the defendant; and, two, try him before returning him to State custody. That's Article 4-C and E of the agreement.

And accordingly, regretfully and reluctantly the indictment must be and is hereby dismissed.

An opinion will follow. See United States ex rel Esola v. Groomes, 520 Fed. 2d 830, Third Circuit, 1975 and United States v. Ricketson, 498 F. 2d, 367, Seventh Circuit, 1974.

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[14] MR. SADAWSKI: The reason for my question, I think the Court should be advised is that the same detainer that was issued to bring him down for testimony before the original Grand Jury is the same detainer that they brought him

down for this appearance. It has never been changed, updated or court-approved since July of last year.

Is that writ still in effect?

THE COURT: No. I suppose that wouldn't be.

MR. SADAWSKI: It is a good question.

MS. KATZ: I would object. I think there is some misunderstanding here.

What happened to Mr. Mauro concerning the civil contempt and whether there is a bail of detainer still lodged pursuant to the Court Order in that case and the production of him in that case is a separate and [15] distinct issue to anything that has to do with the criminal contempt.

He was brought for the purposes of arraignment on an indictment via a writ ad prosequendum to this court, I believe, sometime in November. I don't remember the exact date. That is the writ he is being brought down here on. All of the other writs have to do with the civil contempt and are not before this proceeding.

Now, if counsel wants to make a motion to dismiss the detainer on whatever grounds he wants, as to the civil contempt, that's a separate and distinct proceeding.

THE COURT: Yes. This is an indictment under criminal contempt and the problem before the Court is can he be tried under that indictment inasmuch as a detainer which was lodged in the State Prison was now—was such that he wasn't tried within the proper time and he was returned.

And I say that means that this indictment must be dismissed. There is nothing else before the Court except a dismissal of the indictment.

MR. SADAWSKI: Yes. But I think as a collateral matter to that dismissal all other administrative items which are proving detrimental to the defendant [16] should be removed.

THE COURT: Wait a minute, wait a minute.

The detainer was filed for this indictment, was it?

MS. KATZ: No.

MR. SADAWSKI: No, your Honor.

THE COURT: Well, then nothing else is before me.

MR. SADAWSKI: May I ask from the U.S. Attorney why such a detainer still remains?

MS. KATZ: If Mr. Sadawski would like to make a motion concerning the civil contempt and the validity of the detainer still outstanding, the Government would be happy to reply to that motion. And that motion has not been made now or in the past. The motion was made as to the criminal contempt and that's separate. • • •

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[17] THE COURT: • • • The civil contempt I thought was more or less satisfied. Wasn't that over with? I mean, Judge Costantino put him in jail stating he could satisfy the contempt if he testified, right? And he never testified, is that right?

MS. KATZ: Yes.

THE COURT: Isn't that all over with now?

MR. SADAWSKI: The query, is that Grand Jury still alive?

MS. KATZ: The Grand Jury is still alive.

THE COURT: The Grand Jury is still alive. • • •

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

—against—

JOHN FUSCO,

Defendant.

75 CR 819

United States Courthouse
Brooklyn, New York

April 29, 1976
10:00 a.m.

Before:

HONORABLE JOHN R. BARTELS, U.S.D.J.

I hereby certify that the foregoing is a true and accurate transcript from my stenographic notes in this proceeding.

/s/ Perry Auerbach
Official Court Reporter
U.S. District Court

PERRY AUERBACH
ACTING OFFICIAL COURT REPORTER

[2] Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: MARSHA KATZ, ESQ.
Assistant United States Attorney

JOHN CORBETT, ESQ.
Attorney for Defendant

[3] (Discussion off the record.)

MISS KATZ: We are discussing the motion made by John Mauro through his attorney concerning interstate agreement on detainers act. Mr. Fusco was brought out of—I believe it is Clinton State Prison on November 5, 1975, for the purposes of arraignment. He was returned to that prison on December 18, 1975, and then he was, pursuant to a writ of ad prosequandum brought to this court. He left Clinton on April 28, 1976, and is at present in the courtroom today.

THE COURT: Wait a minute. He was sent back on December 17th, right?

MISS KATZ: 18th, your Honor.

THE COURT: Then he was brought down here?

MISS KATZ: April 28, 1976.

THE COURT: Yes. You see, there are two phases of the statute that are involved. I think to bring him down on November 5th, you can't return him according to my interpretation of the statute without trying him.

MISS KATZ: Your Honor, as to the question of the 120 days, at the time Mr. Fusco was in the courtroom, I believe that the original trial date for this was February 4th.

[4] MR. CORBETT: That is right.

MISS KATZ: The Government at the time stated that they were ready to try the case at the time of the arraignment. Your Honor set it down for February 4th. Quite honestly, it was adjourned, I believe, by your Honor to this date.

MR. CORBETT: That is right.

THE COURT: After—didn't I ask them if they waived speedy trial?

MISS KATZ: Your Honor, I am sorry. I don't have any notation about that.

MR. CORBETT: I have no notation of that. My notation was this was on December 2nd. We appeared before your Honor and a trial date was set for February 4th.

THE COURT: However, he was sent back.

MR. CORBETT: He was sent back to Clinton Prison at Dannemora at that time.

THE COURT: Well—

MISS KATZ: I don't believe there is any issue on the 120 days. It is true that he was sent back prior to the completion of all the criminal proceedings in this case.

THE COURT: Well, I have to know the exact time of the writ. I guess the files will show that on [5] November 5 he was really down here.

MISS KATZ: Yes, your Honor. I believe it is the same writ that was used for Mr. Mauro. It is a writ of ad prosequandum.

Now, he was brought forth on other dates, but that was pursuant to the civil contempt, and his testimony before the Grand Jury, which has nothing to do with this case.

THE COURT: And he was returned on December the 18th.

MISS KATZ: Yes.

THE COURT: Without being tried.

MISS KATZ: Yes, your Honor.

THE COURT: And the case was set down for April 28th.

MISS KATZ: Your Honor, originally it was set down for February 4th.

THE COURT: Well, in February 4th, that was just about 90 days, approximately; wasn't it?

MISS KATZ: I believe it is approximately that.

THE COURT: February 4th, assuming he wasn't returned, I mean you still have to try within 120 days.

MISS KATZ: Your Honor, I believe that the delay was because of your own calendar and your own schedule.

[6] THE COURT: It was delayed because on February the 4th I went into the hospital.

MISS KATZ: Yes, your Honor. I don't believe that is a delay that can be attributed to the Government. We were certainly ready to proceed immediately and try the case on February 4th.

THE COURT: I went to the hospital that day or February 3rd, and then it was put down for April.

MR. CORBETT: Yes, sir. For today.

THE COURT: So, as far as the 120 days is concerned, this case differs from the case of Mauro; doesn't it?

MISS KATZ: Well, your Honor, it is our position that in Mauro, he consented to the trial date because of commitments.

THE COURT: He denied that, as you know, right in your presence.

MISS KATZ: I think it was denied, his consent to be returned to the prison. I don't think he denied to be returned on that date. I think he consented.

THE COURT: That is within 120 days.

MISS KATZ: Your Honor, I am not really sure. But he was offered two alternative days, and this was the choice made by him and his attorney. He was offered both the 4th and the 9th, which he rejected. [7] So, I believe that that was not a delay attributable to the Government, and that we were prepared to try him within the 120 days.

THE COURT: I think that—

THE CLERK: I believe you offered him either February 4th or 8th.

THE COURT: Who is "he"?

THE CLERK: The attorney for Mr. Mauro.

THE COURT: It was the attorney for Mr. Mauro.

MISS KATZ: But Mr. Mauro was present in the courtroom and consulted with him.

THE COURT: Yes. Now he is bound by that.

MISS KATZ: I don't believe that the delay is attributable to the Government.

THE COURT: And you say that in this case that the delay is not attributable to the Government?

MISS KATZ: No, your Honor. You pointed out that you were hospitalized. It certainly can't be attributable to the Government.

THE COURT: Anyway, you returned him.

MISS KATZ: Yes. The facts are he was produced on November 5, 1975, for the purposes of arraignment, and he was returned prior to trial.

THE COURT: Yes. Well, there wasn't any trial. He returned December 18th. Now, I assume you move for [8] a dismissal in the Interstate Detainer Act; is that right?

MR. CORBETT: I so move.

THE COURT: I don't know why this case is any different from Mauro.

MISS KATZ: Your Honor, I did not say there was any difference.

THE COURT: So I have no alternative; do I?

MISS KATZ: Well, your Honor, you have. If your Honor would like me to reargue the issues of law that I did in the case of the United States vs. Mauro, I would be happy to do so.

THE COURT: All you have to do is give me the same brief.

MISS KATZ: Yes. The factual pattern is similar to Mr.

Mauro's situation. I would resubmit my memorandum of law in this case, as I did in Mr. Mauro's case, and make the same oral argument, some of which was made in the Third Circuit case and was rejected. One of these was, it was not a real detainer, it was a writ, and that is the reason it did not fall in the Detainer Act.

The second fact is the Act requires in Part 3, a formal acknowledgement of invoking rights under the Interstate Agreement Act. I would argue that in Part 4, [9] it also requires a formal act of-actually stated that we were invoking our rights under the Interstate Act.

THE COURT: What you say, that unless the defendant at the time—

MISS KATZ: Your Honor, in Part 3, the defendant must specifically invoke the act, and I would argue that in order to bring Part 4 into play, the Government must specifically invoke the Act, which was not done in this case.

THE COURT: You mean in order to bring in Part 4, the Government must demand a trial, that he didn't do it?

MISS KATZ: Your Honor, in order to bring in Part 4, we must demand that his production under Part 4 of the Interstate Agreement Act, which wasn't done.

THE COURT: Neither made any demand.

MISS KATZ: Yes, your Honor, but I believe in Part 3, in order for a defendant to invoke his right into Part 3, you must specifically invoke the Act by so stating in writing that he is moving for a completion of a detainer or matters concerning a detainer under the Interstate Agreement Act, Part 3.

I would suggest to this Court that the Government must do the same thing that in order to have an individual produced pursuant to the Interstate Agreement [10] Act, we must state in writing that we demand the prisoner pursuant to Part 4 of the Interstate Agreement Act, and if we do not do so, then we are not bound by the other provisions of the Act.

THE COURT: Because you circumvent the other Act completely; wouldn't you? All you have to do, you pay no attention to a detainer.

MISS KATZ: I believe the Government need not invoke the Act. That is not, no. Say that other jurisdictions might not need the—

THE COURT: You made that argument.

MISS KATZ: Yes, your Honor. I believe I have.

THE COURT: Then you also say that if the defendant wants to take advantage of it, he has to.

MISS KATZ: Right.

THE COURT: Right.

MISS KATZ: Yes, your Honor.

THE COURT: He has to do it in writing.

MISS KATZ: Yes, sir. And I also suggest that a defendant can waive his rights by requesting that he be returned to —whether it be the State Prison or from a State or a Federal Prison, from whence he came.

THE COURT: You never had that here.

MISS KATZ: Well, your Honor, until we get a [11] copy of the proceedings, we don't know exactly who agreed and who did not agree to be returned.

THE COURT: I don't think you have that in the proceedings. He was returned. I don't think he put down on the record one way or the other whether he was requesting it or you were.

MISS KATZ: Your Honor, I believe Mr. Fusco did request to be returned to Clinton. That he did not want to stay here. But, this is my recollection.

MR. CORBETT: I don't recall that being on the record.

THE COURT: Well, you better find out, Miss Katz. You find out.

MISS KATZ: Your Honor, Mr. Corbett was in the courtroom. Do you recall it being on the record or not, that Mr. Fusco requested that he be returned?

MR. CORBETT: I know he spoke to me, not in the courtroom, and said he was unhappy with the MCC, and would like to go to Dannemora, but he never stated on the record, as I recall, Miss Katz.

MISS KATZ: Your Honor, he did make a representation, whether it was on the record or not.

THE COURT: Of course, when you waive a right, you must do so knowing as to what you are waiving. And I assume, Mr. Corbett, that you didn't tell him [12] that he had a right to be tried here?

MR. CORBETT: No, I did not.

THE COURT: (Continuing) In 120 days, and that if he didn't request or waive that right, the Government could

not return him without a trial, and if the Government did return him, under the circumstances, they could no longer try him.

MR. CORBETT: Yes, sir.

THE COURT: Fortunately, Miss Katz, the defense here is one that is not too serious. But, you could have a hijacking case or a bank robbery, and then to let the fellow off—

MISS KATZ: Well, your Honor—

THE COURT: You see, that would be terrible; wouldn't it?

MISS KATZ: I would suggest that there are probably many cases in this jurisdiction, as well as other jurisdictions, where this procedure has been followed. It is not an unusual procedure for an individual to be produced for the purposes of an arraignment and then returned until such time as trial. So, I—although, and I certainly am not sure I agree with you that this is not a serious offense. I believe this is not. It is unlucky that this is the only case where the fact will be involved in.

• • •

[13] THE COURT: All right. Mr. Fusco, you are going to be very lucky. Due to a statute that was passed in 1970, the Government could not return you after your original place of incarceration, without automatically requiring the Court to dismiss the indictment against you. The Government did return you on December 18th and automatically I have to dismiss the indictment. So, I am dismissing the indictment.

MR. FUSCO: Your Honor, may I say something?

THE COURT: Yes.

MR. FUSCO: You stated that you felt I was lucky. Well, I was just at a parole hearing and I was given the maximum I could get at the parole hearing, due to the circumstances that I had an unfavorable report from the DA's office. Now, I really feel that because of all of this that I went through was due to this unfavorable report, because he is in total contrast with what he had stated at my sentencing.

MR. CORBETT: This was the District Attorney in [14] Queens County.

MR. FUSCO: But now the penalty has already been served twice to me; civil contempt by a parole board, and I lost my job. Then I was denied programs. I have been far from

lucky on all these circumstances. I am serving a life sentence, your Honor.

THE COURT: You brought in a lot of cocaine.

MR. FUSCO: I know, sir. I was charged with an attempted possession. An attempt.

THE COURT: Did you have a record?

MR. FUSCO: No, sir. I was never incarcerated in my life. Three years in the Service. I am married. I worked till the day I was incarcerated.

THE COURT: It was the District Attorney in Queens' report?

MR. FUSCO: Yes, sir. I feel this had plenty to do with it.

THE COURT: Wait a minute. Wait a minute. Don't talk so fast without knowing what you are talking about. I am asking you to listen for a minute.

Miss Katz, you don't have to do with any report?

MISS KATZ: Your Honor, I believe that a notification was made to the District Attorney's Office concerning the fact that he was put before the Grand Jury and granted immunity and he refused to testify. [15] I don't think there is little question about the factual situation, and the dismissal in this situation has nothing to do with that situation.

THE COURT: None whatsoever. You are lucky; still lucky, because if you were tried, you refused to answer, and if this indictment stood up and you were found guilty, I was going to add to your sentence. Now, keep that in mind and see how lucky you are. You can't come here and thumb your nose at justice and do the things you have done and then tell everyone how unlucky you are. You are lucky because the indictment was dismissed.

• • •

SUPREME COURT OF THE UNITED STATES

No. 76-1596

UNITED STATES, *Petitioner*,

v.

JOHN MAURO AND JOHN FUSCO

ORDER ALLOWING CERTIORARI. Filed October 3, 1977

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second ———— Circuit is granted. The case is set for argument in tandem with No. 77-52.

☆ U. S. Government Printing Office: 1977—249-541/86

June 10

No. 76-1596

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, petitioner

-V-

JOHN MAURO and JOHN FUSCO, respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT, JOHN FUSCO IN OPPOSITION

JOHN C. CORBETT
Attorney for respondent
JOHN FUSCO
Office & P.O. Address
66 Court Street
Brooklyn, New York 11201

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, Petitioner

-V-

JOHN MAURO and JOHN FUSCO, Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT,
JOHN FUSCO, IN OPPOSITION

The basic question raised by the petition for writ of certiorari is whether the government by issuing a writ of habeas corpus ad prosequendum may ignore and bypass the provisions of the Interstate Agreement on Detainers Act, Sections 1-8, 84 stat. 1397-1403, 18 U.S.C. App., pages 4475-4478.

The Interstate Agreement on Detainers Act ("Agreement") was passed by act of Congress on December 9, 1970 and the United States thereby joined the Agreement. Although, no statute was passed abolishing the writ of habeas corpus ad prosequendum because of the fact that the states of Alabama, Alaska, Mississippi and Oklahoma have never adopted the Agreement. In order for the government to obtain a prisoner from one of their institutions for trial, the use of such a writ would be mandatory. As these states are not part of the Agreement

the writ would be the only means by which the government could obtain one of their prisoners for trial. However, the writ was not left on the statute books to provide the government with a back door to use to avoid its obligations as an adopting state under the Agreement.

The purpose of the Agreement, which was adopted in its entirety by the United States without modifications is set forth in Article 1 as follows:

> The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

When the United States adopted this Agreement without modification, Article 1 became a legislative statement of the agreement of the government as to the obtaining of prisoners from state jurisdictions. In reading the text of the Agreement itself to determine the intent of Congress, nowhere does the Agreement state that the United States does not have to follow it if the prosecutor finds it is inconvenient or desires to avoid its terms. Where the government does not follow the procedure set forth in the Agreement and proceeds to obtain the prisoner in question by a writ of habeas corpus ad prosequendum it is never-

theless bound by the terms of the Agreement.

While the government petition states that the uniform practice of federal prosecutors, before and after enactment of the Agreement by Congress in 1970, has been to apply to the District Courts for writ of habeas corpus ad prosequendum, all the petitioner is stating is that the government has habitually ignored the provisions of the Agreement which is as binding on the government as it is on the states. The problem is one which can be solved by the Department of Justice instructing its various prosecutors that the Agreement is the law for the obtaining of prisoners from the states and that the writ of habeas corpus ad prosequendum should only be used to obtain prisoners from those states who are not part of the agreement.

The complaint of the government set forth in the petition for writ of certiorari states that the government has now been faced with numerous proceedings by prisoners to dismiss their federal indictments because of the violation of the terms of the Agreement by the federal prosecutors. Certainly if the federal prosecutors have been habitually violating the terms of the Agreement then the prisoners bringing on such proceedings are certainly justified and the indictments should be dismissed. The remedy for the government to avoid these questions when state prisoners taken into government custody and then returned without trial, is to instruct federal prosecutors to follow the terms of the Agreement to the letter. In this way no prisoners would have ground for bringing on proceedings to dismiss their indictments.

It is therefore respectfully submitted that a petition for writ of certiorari should be denied.

JUNE, 1977 -3-

JOHN C. CORBETT
Attorney for Respondent JOHN FUSCO

No. 76-1596

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN MAUBO AND JOHN FUSCO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. McCREE, Jr.,
Solicitor General,
BENJAMIN R. CIVILETTI,
Assistant Attorney General,
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 544 F. 2d 588. The opinion of the district court (Pet. App. E) is reported at 414 F. Supp. 358.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on October 26, 1976, and a petition for rehearing with a suggestion for rehearing *en banc* was denied on March 15, 1977 (Pet. App. C and D). On April 11, 1977, Mr. Justice Marshall extended the time for the filing of a petition for a writ of certiorari

to and including May 14, 1977. The petition was filed on May 13, 1977, and was granted on October 3, 1977 (A. 58). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a writ of *habeas corpus ad prosequendum* issued by a federal court to state authorities and directing the production of a state prisoner for arraignment on federal criminal charges constitutes both a "detainer" and a "request for temporary custody" making applicable the terms and conditions of Article IV of the Interstate Agreement on Detainers Act.

STATUTE INVOLVED

The pertinent portions of the Interstate Agreement on Detainers Act, 18 U.S.C. App., pp. 4475–4478, are set forth in the Appendix to our brief in *United States* v. *Ford*, No. 77-52.

STATEMENT

1. On November 3, 1975, respondents John Mauro and John Fusco were charged with criminal contempt of court, in violation of 18 U.S.C. 401, in separate indictments filed in the United States District Court for the Eastern District of New York. The charges stemmed from respondents' refusal to testify, despite a judicial grant of immunity, before a federal grand jury investigating violations of the federal drug laws (A. 1, 3, 5, 6).

When the indictments were returned, respondents were incarcerated at different New York State correctional facilities serving sentences on state criminal

charges.[1] Pursuant to separate writs of *habeas corpus ad prosequendum* issued by the United States District Court for the Eastern District of New York on November 5, 1975, each respondent was removed from state prison and produced before the district court for arraignment.[2] On November 24, 1975, respondents were arraigned upon their respective indictments and entered pleas of not guilty (A. 1, 3, 31). They were then retained in federal custody at the Metropolitan Correctional Center in New York City.

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[1] Respondent Mauro was serving a sentence of three years to life imprisonment at the Auburn, New York, Correctional Facility, and respondent Fusco was serving a sentence of one year to life imprisonment at the Clinton Correctional Facility, Dannemora, New York (Pet. App. 2a, n. 1).

[2] Each writ was in the same form and was addressed to the United States Marshal for the Eastern District of New York and the warden of the appropriate state correctional facility. The writs ordered that respondents be produced before the district court on November 19, 1975. Thus, for example, the writ employed to secure respondent Mauro's presence for arraignment provided as follows (A. 9):

"YOU ARE HEREBY COMMANDED to have the body of John Mauro now detained under your custody, as it is said, under safe and secure conduct, in civilian clothes, before the United States District Court for the Eastern District of New York, at the United States Courthouse, in such courtroom as shall be designated, in the Borough of Brooklyn, City, State and Eastern District of New York, on the 19th day of November at 10 o'clock in the forenoon of that day, for trial before said United States District Court for the Eastern District of New York upon an indictment filed in said Eastern District of New York against the said John Mauro charging him with violation of Title 18 United States Code, Section 401 and, at the termination of the proceedings in the said United States District Court on that particular day, that you return him forthwith to the Warden, Auburn Correctional Facility, Auburn, N.Y. under safe and secure conduct."

Thereafter, on December 2, 1975, respondents appeared before the federal district court for the purpose of fixing trial dates. After setting dates that were agreeable to counsel for respondents (A. 35–37), the district court observed that the Metropolitan Correctional Center was "overcrowded" (A. 37). Accordingly, the court directed that respondents be returned to their respective state prisons and thereafter be "writ[ted] down" shortly before trial (A. 37). After the court rejected the request of another defendant to remain at the federal detention facility, respondent Fusco expressed a preference to return to state prison, while respondent Mauro asked to remain at the Metropolitan Correctional Center if the warden had no objection (A. 37–38). The district court indicated that it did not oppose respondent Mauro's remaining at the Metropolitan Correctional Center so long as there was sufficient space available at the Center to accommodate him (A. 38). Shortly thereafter, however, both respondents were returned to their respective state facilities.

2. On April 26 and April 29, 1976, respectively, respondents Mauro and Fusco were again removed from state prison and brought before the district court under the authority of writs of *habeas corpus ad prosequendum*. Prior to these appearances, respondents had moved for dismissal of their indictments in the federal district court on the ground that they had been returned to state prison after their arraignments without having first been tried on the federal charges, in alleged violation of Article IV(e) of the Interstate Agreement on Detainers Act

("Agreement") (A. 1, 3, 19–24). Article IV(a) of the Agreement provides that the prosecuting authority of a member state in which criminal charges are pending against a defendant serving a prison sentence in another member jurisdiction may lodge a "detainer" with the prison authority of that jurisdiction and, upon presentation of a "written request for temporary custody," obtain temporary custody of the prisoner for purposes of trial.[3] The Agreement further provides that a prisoner so procured must be tried (a) within 120 days of his arrival in the receiving state (subject to continuances granted "for good cause shown in open court") and (b) prior to being returned to the sending state, or else the charges against him shall be dismissed with prejudice. Articles IV(c), IV(e), V(c).[4]

[3] Both the United States and New York had become signatories to the Agreement prior to the relevant events in this case. Act of December 9, 1970, Sections 1–8, 84 Stat. 1397–1403, 18 U.S.C. App., pp. 4475–4478; N.Y. Crim. Proc. L. § 580.20 (McKinney 1971).

[4] Article III of the Agreement provides an alternative means by which pending charges may be cleared. Under Article III(c), prison officials are required to notify each prisoner of any criminal charge on the basis of which a detainer has been lodged against him by another jurisdiction and, further, to inform the prisoner of his right to request trial on the charges underlying the detainer. The prisoner may then act to clear such a detainer by filing a request with the appropriate authorities in the prosecuting jurisdiction for final disposition of the charge against him. He must thereupon be brought to trial (a) within 180 days of delivery of this request and (b) without being returned to the sending state after his transfer to the prosecuting state, or else the charges are subject to dismissal with prejudice. Articles III(a), III(d), and V(c).

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The district court granted respondents' motions to dismiss the indictments (A. 2, 4, 47, 56). In its opinion accompanying the dismissal order in *Mauro*, the court rejected the government's argument that, because no "detainer" had been lodged against respondent Mauro[5] and because respondent had been produced before the district court solely pursuant to a writ of *habeas corpus ad prosequendum*, the Agreement's provisions were inapplicable and provided no grounds for dismissing the indictment. The court concluded that whenever the Agreement is "available" to produce a defendant for purposes of prosecution, "it is the exclusive means for doing so and the Government is charged with having invoked its provisions by use of the writ" (Pet. App. 40a). The court granted respondent Fusco relief on the basis of its decision in Mauro's case.

3. A divided panel of the court of appeals affirmed (Pet. App. 1a–23a). The majority held that the writ of *habeas corpus ad prosequendum* was a "detainer"

[5] In connection with a *civil* contempt adjudication (A. 27), federal officials had filed a "detainer" against respondent Mauro on July 9, 1975, several months before the return of the indictment in the case (A. 21, 28, 48–49). As we argue in our brief in *United States* v. *Ford*, No. 77–52, certiorari granted, October 3, 1977, the presence of a detainer does not engage the provisions of the Agreement when a prisoner's presence in court is accomplished by means of the federal writ *ad prosequendum*. However, even if the Court were to reject this analysis in *Ford*, Article IV by its terms would apply only to a detainer based on an "untried indictment, information, or complaint." Article IV(a). Thus, the detainer for civil contempt has no bearing on the question whether the subsequent criminal prosecution for criminal contempt was subject to the terms and conditions of the Agreement.

as that term is used in the Agreement and that the use of the writ by federal authorities in this case sufficed to activate the provisions of the Agreement. In the view of the majority, "[a]ny other construction would permit the United States to evade and circumvent the Agreement by simply utilizing the traditional writ" (*id.* at 8a; footnote omitted).

In dissent, Judge Mansfield, after examining the significant functional and legal differences between a detainer and a writ *ad prosequendum*, concluded that the writ is not a "detainer" within the Agreement, but rather a mandatory federal court order issued under the express authority of a statute (28 U.S.C. 2241(c)(5)) that was neither repealed nor modified by the Agreement (Pet. App. 17a–19a, 23a). Since the Agreement in his view applies only to prisoners against whom detainers have been lodged and not to prisoners, like respondents, who are produced pursuant to the writ without prior placement of a detainer, Judge Mansfield concluded that it afforded no basis for dismissal of respondents' indictments.[6] As Judge Mansfield stated (Pet. App. 20a):

> [T]he important point is that the Detainers Act applies only to those subject to detainers, not to persons surrendered pursuant to § 2241 writs or to proceedings in connection with which such writs are used.

[6] For reasons set forth in our brief in *United States* v. *Ford*, *supra*, we disagree with Judge Mansfield's view that the Agreement is applicable when a detainer has been lodged and the state prisoner's attendance in federal court is obtained by *ad prosequendum* writ.

SUMMARY OF ARGUMENT

This case presents the question whether a federal writ of *habeas corpus ad prosequendum* issued to state authorities to secure a prisoner for arraignment on federal charges constitutes both a "detainer" and a "request for temporary custody" making applicable the terms and conditions of the Interstate Agreement on Detainers Act. As we have discussed in our brief in *United States* v. *Ford*, No. 77–52, we do not believe that Congress intended the United States ever to be a receiving state subject to Article IV of the Agreement and, in any event, did not intend the United States to be subject to Article IV of the Agreement when it obtained state prisoners by the traditional *ad prosequendum* writ. If we are correct in either of these submissions, it follows that the decision of the court of appeals in this case must be reversed.

Even if the Court rejects our arguments in *United States* v. *Ford*, however, the *ad prosequendum* writ is not itself a "detainer," and its use, in the absence of a pre-existing detainer, does not activate the restrictions of Article IV of the Agreement. The Interstate Agreement on Detainers was drafted in large part to remedy the problems created by long-standing detainers lodged by prosecuting authorities against prisoners in other jurisdictions. By definition, a detainer is merely a notification that charges are pending against a prisoner in another jurisdiction and, far from seeking immediate delivery of the prisoner, merely asks that the prisoner be detained for possible delivery to another jurisdiction at the conclusion of his sentence. Detainers often remained outstanding for many years, adversely affecting the prisoners' opportunities for rehabilitation, even though in many instances the jurisdiction that had lodged the detainer ultimately decided not even to prosecute the pending charges. The *ad prosequendum* writ, however, initiates immediate proceedings and thus provokes none of the evils against which the Agreement was designed to protect. Indeed, the Agreement on its face treats the lodging of a detainer and a request for custody as separate and distinct acts.

Moreover, no substantial interest is served by stretching the term "detainer" to include the *ad prosequendum writ*. The Speedy Trial Act of 1974 provides comprehensive protection for the rights of prisoners facing federal charges. Although the Speedy Trial Act does not require dismissal of charges whenever a defendant is returned to state prison before trial, there is no evidence that Congress intended to confer this technical windfall on state prisoners without regard to the problems of overcrowded and inconvenient federal facilities, and the prisoners derive little if any benefit from this restriction.

ARGUMENT

THE WRIT OF HABEAS CORPUS AD PROSEQUENDUM DOES NOT CONSTITUTE BOTH A DETAINER AND A REQUEST FOR TEMPORARY CUSTODY MAKING APPLICABLE ARTICLE IV OF THE INTERSTATE AGREEMENT ON DETAINERS

Our brief in *United States* v. *Ford, supra,* sets forth our position that Congress, when it enacted the

Interstate Agreement on Detainers Act in 1970, did not understand or intend that the Agreement would apply to the United States as a "receiving state." We have also argued that, in any event, a writ of *habeas corpus ad prosequendum* is not a "request" for purposes of Article IV of the Agreement. In our view, these conclusions are compelled by the structure and purposes of the Agreement, viewed in context of the federal *habeas corpus* statute and the Speedy Trial Act of 1974.

Many of these arguments are relevant to the additional question presented in this case: whether the *ad prosequendum* writ itself is a "detainer" for purposes of Article IV of the Agreement. To the extent possible, therefore, we shall rely on the materials discussed in *Ford* without repeating them.[7] Should the Court accept either of our submissions in *Ford*, that decision would control this case as well. Even if the Court should disagree with our *Ford* arguments, however, we think it plain that a writ of *habeas corpus* simply is not a "detainer" and does not by itself make applicable Article IV of the Interstate Agreement on Detainers. The majority of appellate courts to consider this issue agree with us. See *United States* v. *Kenaan*, 557 F. 2d 912 (C.A. 1), petition for a writ of certiorari pending, No. 77-206; *United States* v. *Scallion*, 548 F. 2d 1168 (C.A. 5), petition for a writ of certiorari pending, No. 76-6559; *Ridgeway* v. *United States*, 558 F. 2d 357 (C.A. 6), petition for a writ of certiorari pending, No. 77-5252; *United*

[7] We are sending copies of our *Ford* brief to respondents.

States v. *Ricketson*, 498 F. 2d 367 (C.A. 7). Contra, *United States* v. *Sorrell* and *United States* v. *Thompson*, C.A. 3, Nos. 76-1647 and 76-1976, decided August 22, 1977 (*en banc*) petition for writs of certiorari pending, No. 77-593.

1. The Interstate Agreement on Detainers was drafted to serve two principal purposes. First, the Agreement sought "to encourage the expeditious and orderly disposition of [outstanding] charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints" (Article I). Second, the Agreement intended "to provide * * * cooperative procedures" to facilitate disposition of those charges. *Ibid.* Prior to the Agreement, states had experienced difficulties in obtaining prisoners from other jurisdictions through the cumbersome extradition process and had gradually developed a practice of lodging a "detainer" with the prison authorities and deferring prosecution efforts until the prisoner was released (see *Ford* Br. 22-29).

The detainer lodged with prison authorities was merely an administrative request to hold the prisoner at the end of his existing sentence. The House and Senate Reports on the Detainers Act define it as "a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction" (H.R. Rep. No. 91-1018, 91st Cong., 2d Sess. 2 (1970); S. Rep. No. 91-1356, 91st Cong., 2d Sess. 2 (1970)). A detainer did not demand immediate delivery of the prisoner to the requesting state; indeed,

its purpose was precisely the opposite, since it enabled the prosecutor to postpone further proceedings without risking loss of the prisoner. As constitutional speedy trial provisions did not bind the states until 1967, see *Klopfer* v. *North Carolina,* 386 U.S. 213, and as the prisoner had no way of forcing trial on the detainer, see *Crow* v. *United States,* 323 F. 2d 888 (C.A. 8) (a situation that has since changed, see *Braden* v. *30th Judicial Circuit Court of Kentucky,* 410 U.S. 484), these detainers often remained outstanding against the prisoner for extended periods of time. Frequently, the charges on which they were based ultimately were dropped when the prisoner was released.

As the House and Senate Reports on the Detainers Act reflect, the presence of state detainers caused substantial concern among prison officials. Development of a comprehensive rehabilitation plan was impeded by uncertainties about the prisoner's future. In many cases, such detainers precluded the prisoner from participating in particular programs or from receiving special assignments. Moreover, a prisoner with unclear prospects has less incentive to cooperate with rehabilitation efforts (H.R. Rep. No. 91–1018, *supra,* at 3; S. Rep. No. 91–1356, *supra,* at 3).

Article III of the Interstate Agreement was drafted to remedy this problem. While Article IV gave member states a more expedient method of obtaining prisoners in other jurisdictions, and therefore assisted states seeking to provide prompt trials, Article III gave prisoners the right to demand trial of charges on which detainers were based. Whether or not the

prosecuting state sought to proceed, therefore, it was required by virtue of the Agreement to bring the prisoner to trial within 180 days of the receipt of his request for trial, subject to continuances "for good cause shown in open court, the prisoner or his counsel being present." Article III(a). If the prosecutor failed to do so, the charges were dismissed and "any detainer based thereon * * * cease[d] to be of any force or effect." Article V(c).

Although aware of the general detainer problem, Congress, in enacting the Agreement on behalf of the United States, was specifically concerned with "elimination of abuses of detainers by states—not of abuses of the writ of habeas corpus ad prosequendum by federal prosecutors." *United States* v. *Scallion, supra,* 548 F. 2d at 1172–1173, nn. 5, 6; *United States* v. *Kenaan, supra,* 557 F. 2d at 915, n. 7. As we have discussed in our *Ford* brief (pp. 29–34). Congress entered into the Agreement to give states surer access to federal prisoners, an increasingly pressing need after *Smith* v. *Hooey,* 393 U.S. 374, and *Dickey* v. *Florida,* 398 U.S. 30, were decided, and to reduce the rehabilitation problems for federal prisoners caused by languishing state detainers. Neither the Act nor its legislative history contains any indication that Congress meant to place unnecessary restrictions on the traditional writ of *habeas corpus ad prosequendum* (*Ford* Br. 29–34) or to require the federal government to forego the writ entirely and depend solely on the Detainers Act. But even assuming, *arguendo,* that Congress did in-

tend the United States to be a receiving state under the Act and use of the *ad prosequendum* writ to be restricted in certain cases, there is nevertheless no basis for holding that the writ is also a "detainer" for purposes of the Act. As other courts of appeals have already noted (*United States* v. *Kenaan, supra; United States* v. *Scallion, supra; Ridgeway* v. *United States, supra*), use of the *ad prosequendum* writ does not provoke the evils against which the Agreement provides.

2. The writ of *habeas corpus ad prosequendum* has had a long history (*Ford* Br. 18–22). Long before the adoption of the Agreement, federal district courts customarily used the writ of *habeas corpus ad prosequendum* for the purpose of bringing a prisoner before the court for trial. The writ is not a mere request but a judicial order designed to secure the necessary physical custody over a prisoner to effectuate the existing criminal jurisdiction of the court. See note 2, *supra*. In addition, the writ *ad prosequendum*, which is subject to immediate execution, facilitates the expeditious resolution of pending criminal charges and thus ensures the defendant a speedy trial in accordance with constitutional as well as statutory guarantees. See *McDonald* v. *Ciccone*, 409 F. 2d 28, 30 (C.A. 8); *United States ex rel. Moses* v. *Kipp*, 323 F. 2d 147, 149–150 (C.A. 7). Use of the writ to bring a state prisoner before a federal court for trial and sentence was sufficiently common to be characterized by one court as "standard operating procedure." *United States* v. *Schurman*, 84 F. Supp. 411, 413 (S.D. N.Y.).

Unlike a typical detainer, the writ of *habeas corpus ad prosequendum* does not require action in the distant future and indeed has no continuing effect. It is not a notice that the prisoner may someday be wanted for trial on federal charges, as an arrest warrant would be,[8] but is a federal court order commanding that the prisoner be brought before the court at a specified time so that the court may exercise its jurisdiction over him. It therefore signifies an intent to proceed with charges, not to defer them. As Judge Mansfield correctly noted: "[The writ] is executed at once and, upon return of the prisoner to the state institution, it does not remain outstanding against him as would a detainer" (Pet. App. 20a).[9]

Treatment of the writ as a "detainer" is not only unnecessary for purposes of the Agreement but also is inconsistent with its plain language. Article IV(a) of the Agreement states that the prosecuting official in the receiving state "shall be entitled to have a prisoner *against whom he has lodged a detainer* * * * made available * * * *upon presentation of a written*

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[8] The federal government has lodged warrants as detainers with state prison officials. See, *e.g.*, *United States* v. *Ford*, 550 F. 2d 732 (C.A. 2).

[9] In one instance prior to the enactment of the Agreement by Congress, a state prisoner sought to remove a detainer filed against him by federal authorities by petitioning the federal court for the issuance of a writ of *habeas corpus ad prosequendum*. *Crow* v. *United States*, 323 F. 2d 888 (C.A. 8). While the court denied the relief sought, its discussion of the writ's function vis-a-vis the detainer demonstrates that the two are different legal tools serving different ends. Cf. *Huston* v. *State of Kansas*, 390 F. 2d 156 (C.A. 10) (federal prisoner challenging state detainer).

request for custody or availability to the appropriate authorities of the [sending] State" (emphasis supplied). On its face, the Agreement appears to regard the lodging of a detainer and the presentation of a request for custody as two discrete events and the "detainer" and "request" as two separate documents. There is no reason rooted either in policy or elsewhere in the language of the Agreement for refusing to give these words their normal meaning.

The court of appeals justified its reading of the Agreement on the ground that "[a]ny other construction would permit the United States to evade and circumvent the Agreement by simply using the traditional writ" (Pet. App. 8a; footnote omitted). That rationale depends, of course, on the incorrect assumption that Congress intended the Agreement to impose conditions on use of the writ. It also completely overlooks the fact that the writ, standing alone, entails none of the evils that were thought to inhere in the pendency of long-standing detainers and that motivated promulgation of the Agreement. Since the writ does not function like a detainer, its use in the absence of a detainer cannot fairly be condemned as a circumvention of the purpose of the Agreement.

The majority below also appears to have assumed that the Agreement is indispensable to a reasonable system of interjurisdictional transfer and that, if the federal government is not held to be entirely subject to its terms, it would benefit at the expense of a prisoner's substantive rights. That assumption is likewise incorrect. Indeed, state prisoners like respondents

would lose virtually no substantive rights vis-a-vis the United States if the Agreement were immediately repealed.

Under the Speedy Trial Act of 1974, once the United States charges a state prisoner with a federal crime it must promptly either secure his presence or file a detainer against him. 18 U.S.C. (Supp. V) 3161 (j)(1). If it elects to utilize an *ad prosequendum* writ to obtain his presence for arraignment, the prisoner must be tried within 60 days thereafter. 18 U.S.C. (Supp. V) 3161(c). Thus, when the United States files no detainer and proceeds by writ, the prisoner faces no risk whatsoever that his rehabilitation will be adversely affected by a long-standing notice of pending but unresolved charges.[10] Even if the United States did file a detainer, moreover, the defendant could request trial on the charges, 18 U.S.C. (Supp. V) 3161(j)(2), and the federal government would be obliged to obtain his presence promptly.[11] 18 U.S.C. (Supp. V) 3161(j)(3). Trial within 60 days after arraignment would again be required.

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[10] Even before the Agreement, a prisoner brought to answer on federal charges would be entitled to a speedy trial under the Sixth Amendment and applicable local rules. Since it had already obtained him once by the writ, the United States could hardly contend that the prisoner was unavailable for purposes of thereafter providing him with a speedy trial.

[11] Although there was no formal procedure before the Agreement for state prisoners to clear federal detainers, those prisoners like respondents against whom the United States was proceeding by writ of *habeas corpus* had no such need. Moreover, in enacting the Agreement, Congress was primarily concerned with abuses of state detainers, not with proceedings under the federal writ. See *United States* v. *Scallion*, *supra*, 548 F. 2d at 1172–1173, nn. 5, 6.

Thus, the only material consequence of stretching the term "detainer" to include the *ad prosequendum* writ is to produce dismissal of charges when the defendant is returned to state prison before trial. Article IV(e). In view of the peculiar problems involved in federal custody of state prisoners (see *Ford* Br. 33–34), it is extremely unlikely that Congress meant to extend this technical windfall to every prisoner returned for convenience to a nearby state prison or, as here, sent back to state prison because of severe overcrowding at the federal facilities. Nor is the provision of particular necessity in the context of state-to-federal transfers by the *ad prosequendum* writ; such transfers can be conducted immediately, unlike repeated interstate or federal-to-state transfers, which are subject in each instance to a 30-day delay (Article IV(a)) and would thus cut against efforts to provide the speediest possible trial.

In the present case, it was not until respondents had been returned to state custody that any of the parties even suggested that the Agreement governed the transfers of respondents from state prison to federal court. Neither respondent objected to being returned to state prison on the ground that such action would violate the Agreement (A. 37–38); on the contrary, respondent Fusco affirmatively requested that

One commentator has stated: "[U]nder the Interstate Agreement the convict has no rights unless the prosecution has filed a detainer on the basis of the pending charge, regardless of whether he knows of the existence of such a charge." Note, *Convicts—The Right to a Speedy Trial and the New Detainer Statutes*, 18 Rutgers L. Rev. 828, 859 (1964).

he be sent back to the state facility where he had previously been incarcerated.[12] Compare *United States* v. *Ford*, 550 F. 2d 732, 742 (C.A. 2); *United States* v. *Scallion, supra*, 548 F. 2d at 1170. Additionally, there is no evidence that the use of the writ in this case had any effect upon respondents' eligibility for, and participation in, the rehabilitation programs offered by the state. In fact, if a goal of the Agreement is to ensure minimal disruption of the prisoner's involvement in rehabilitation programs, that goal would appear better served by returning federal defendants to state custody between arraignment and trial, rather than retaining them for an additional few months in federal custody, often in a local jail where they would be cut off from their existing state rehabilitation programs and where fresh rehabilitative opportunities would be minimal.

[12] In dismissing the government's argument that respondent Fusco had waived his rights under Article IV(e) of the Agreement by requesting to be returned to state prison following his arraignment, the court of appeals observed that, immediately before his request, another defendant's request to remain in federal custody had been denied by the district court because of overcrowding at the Metropolitan Correctional Center. In view of this, the majority below reasoned, it would have been futile for respondent Fusco to have made the same request (Pet. App. 6a, n. 3). Although we did not present this issue in our petition for certiorari, we note that denial of another defendant's request hardly compelled respondent Fusco to express a preference to return to the state institution. Indeed, following respondent Fusco's request, respondent Mauro and two other defendants stated that they wished to remain at the federal detention center, and the district court indicated that it had no objection provided that the center had sufficient space to accommodate them (A. 38).

This is not a case, therefore, where it is necessary or appropriate to stretch the language of a statute to serve a beneficent purpose. The writ of *habeas corpus ad prosequendum* is significantly different from a detainer, and treating it otherwise appears to be outside the understanding of Congress and the objectives of the Detainers Act itself.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1596

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN MAURO AND JOHN FUSCO

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS MAURO AND FUSCO

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PRELIMINARY STATEMENT

Statements as to the opinion below, jurisdiction, the question presented, the statute involved, and the statement of the case have been dispensed with pursuant to Rule 40 of the Rules of the Supreme Court.

SUMMARY OF ARGUMENT

As stated by the government in the petitioner's brief, this case presents the question whether a federal writ of *habeas corpus ad prosequendum* issued to state authorities to secure a prisoner for arraignment on federal charges constitutes both a "Detainer" and a "Request For Temporary Custody" under the Interstate Agreement on Detainers Act, P.L. 91-538, 18 USC. App., pp. 4475-4478.

Contrary to the position of the government as set forth in its brief in *United States v. Ford*, No. 77-52, Congress intended the United States to be a receiving state subject to Article IV of the Agreement.

The Interstate Agreement on Detainers was enacted to expedite the disposition of charges pending against prisoners in other jurisdictions and to minimize the disruptive effect upon rehabilitation caused by the shuttling of prisoners back and forth from one jurisdiction to another for the purpose of prosecution. This shuttling occurs when the United States obtains prisoners by means of the writ of *habeas corpus ad prosequendeum* and thus the Interstate Agreement on Detainers is directed against the evils caused by the production of prisoners by means of the writ, as well as the evils created by longstanding detainers.

In aid of the objectives of the Agreement, the participating parties have promised that where a prisoner is produced from one jurisdiction for trial in another, his trial will be prompt and will take place before his return, on penalty of dismissal of the charges against the prisoner.

Far from being a technical windfall, that sanction gives effect to the Agreement and indicates that the participating parties have held its goals of high importance.

Although the Speedy Trial Act of 1974 further implements some of the ends of the Agreement, there is no evidence that Congress intended the Interstate Agreement to be supplanted by the Speedy Trial Act. As the popular names of the respective

statutes imply, the Speedy Trial Act was enacted to provide prompt trials for all defendants, whether or not they are incarcerated, whereas the Agreement is specifically addressed to the problems created by the transfer of prisoners between sovereigns. The Speedy Trial Act was intended to preserve prior law with regard to interstate transfers.

Furthermove, the fact that the United States now finds itself discomfited by the Agreement is of no bearing in construing the intent of Congress in enacting the Agreement.

ARGUMENT

THE WRIT OF HABEAS CORUPUS AD PROSEQUENDUM IS BOTH A DETAINER AND A REQUEST FOR TEMPORARY CUSTODY MAKING APPLICABLE ARTICLE IV OF THE INTERSTATE AGREEMENT ON DETAINERS.

In its brief in *United States v. Ford, supra*, the government raises the argument that Congress did not intend the Interstate Agreement on Detainers to apply to the United States as a "receiving state". None of the appellate courts to consider the issue agree. As the Court of Appeals for the Second Circuit said in its decision in the present case ". . . The Agreement in clear and unequivocal language commits the United States to all of its terms, including Article IV." (Pet. App. 15a) See also *United States v. Kenaan*, 557 F2d 912 (CAI), petition for a writ of certiorari pending, No. 77-206; *United States v. Sorrell* and *United States v. Thompson*, C.A. 3, Nos. 76-1647 and 76-1976, decided August 22, 1977 (en banc) petition for writs of certiorari pending, No. 77-593; *United States v. Scallion*, 548 F2d 1168 (C.A.5), petition for a writ of certiorari pending, No. 76-6559; *Ridgeway v. United States*, 558 F2d 357 (C.A.6), petition for a writ of certiorari pending No. 77-5252; *United States v. Ricketson*, 498 F2d 367 (C.A.7).

1. In its analysis of the purposes and history of the Interstate Agreement on Detainers, the United States in its brief has narrowly stressed two points as the focus of the legislation.

First, the government contends that Congress enacted the Agreement in order to lend the states surer access to federal prisoners for the purpose of prosecution. This was necessitated by the decisons of *Smith v. Hooey*, 393 US 374, and *Dickey v. Florida*, 398 US 30. (Pet. brief p. 13). Secondly, the government contends that Congress enacted the Agreement in order to eliminate the abuses of the detainer system by the states. Long-standing and stale detainers were often maintained on federal prisoners, thereby damaging their prospects of rehabilitation (Pet. brief p. 13).

We do not dispute that Congress had these objectives in mind when it enacted the Agreement. By so narrowly limiting its analysis, however, the United States has distorted the context of the Agreement and ignored its wider purpose.

The government's interpretation of the Agreement is a unilateral one, characterizing state prosecutors and federal prisoners against whom state criminal charges are pending as the prime beneficiaries of the Agreement. It is the government's position that federal prosecutors do not require the Interstate Agreement because they may produce state prisoners by means of the *ad prosequendum* writ, and that there is never an adverse effect upon the rehabilitation of a state prisoner when so produced.[1]

[1]Notwithstanding the government's position, it appears that it has made extensive use of the detainer. See *United States v. Ford*, 550 F2d 732 at 742, n. 28, 29. Thus its abuse by the federal government is at least a possibility.

The language of the Agreement, however, has no unilateral aspect, and clearly manifests an intent that the transfer of both federal and state prisoners be controlled by its terms. Article II of the Agreement provides that the terms "State", "Sending State" and "Receiving State" shall mean, among others, the United States of America.[2] Thus, the avowed purpose of the Agreement, "to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints" clearly extends to the disposition of federal charges and detainers. It can, moreover, be seen from that language, that more than the determination of the proper status of detainers is contemplated. The expeditious and orderly disposition of charges emanating from other jurisdictions is an objective of equal importance, whether the charges be state or federal.[3]

As the government mentions, use of the writ to produce a state prisoner in federal court for trial has become "standard operating procedure" *United States v. Schurman*, 84 F. Supp. 411, 413 (S.D.N.Y.) (Pet. brief, p. 14). Were this court to exempt the writ of *habeas corpus ad prosequendum* from the operation of the Interstate Agreement on Detainers, then the fabric of the Agreement would be destroyed. The United States would be permitted to evade and circumvent the Agreement by simply utilizing the traditional writ. *United States v. Mauro* (Pet. App. 8a), *United States v. Sorrell* and *United States v. Thompson*

[2]The letter of Graham W. Watt, Assistant Commissioner of the District of Columbia, to the Chairman of the House Committee on the Judiciary is part of the legislative history and clearly indicates that the United States would be participating as a receiving state. (Pet. App. 12a n.9)

[3]See the statement of Senator Hruska, 116 Cong. Rec. 38840 (1970). "By approving (The Agreement) we can insure that the United States will become part of this vitally needed system of symplified and uniform rules for the disposition of pending criminal charges and the exchange of prisoners."

(C.A. 3) Nos. 76-1647 and 76-1976 decided August 22, 1977 (en banc) petition for writs of certiorari pending No. 77-593. See also *United States ex rel Esola v. Groomes*, 520 F2d 830 (C.A. 3).

2. The government argues that the Agreement on Detainers could not have been intended to apply to the writ, because the writ is mandatory, whereas the "request for temporary custody" contemplated by the Agreement is not. The government seeks also to distinguish the writ on the grounds that it has neither the attributes nor the harmful effects of the detainer (Pet. brief pp. 14-16).

Contrary to the government's position, whether the writ of *habeas corpus ad prosequendum* is mandatory is at best an open question. Although there is *dicta* to the effect that state compliance with the writ is a matter of comity between sovereigns, *Ponzi v. Fessenden*, 258 US 254, this court has not addressed itself to the question and has expressly refused to do so.[4] On the other hand, several circuit courts of appeal have expressed or implied the view that compliance with the writ is a matter of comity.[5]

Consequently, it was at best unclear when the Agreement was enacted in 1970 whether the writ had more than the force of a request in the production of state prisoners. The Agreement has

[4]"In view of the cooperation extended by the New York authorities, it is unnecessary to decide what would be the effect of a similar writ absent such cooperation." *Carbo v. United States*, 364 US 611 at 621 n.20.

[5]*United States v. Oliver* 523 F2d 253 (C.A.2); *United States v. Arscue*, 187 F. Supp. 946, affirmed 323 F2d 784 (C.A.4); *United States ex rel Moses v. Kipp*, 232 F2d 147 (C.A.7); *Derenbowski v. U.S. Marshall, Minneapolis Office, Minn., Div.*, 377 F2 223 (C.A.8); *Stamphill v. Johnston*, 136 F2d 291 (C.A.9); *Lundsford v. Hudspeth*, 126 F2d 653 (C.A.10). See also, Anno, "Writ of Habeas Corpus Ad Prosequendum in Federal Courts, 5 LEd, 964.

resolved this uncertainty by codifying the manner in which the request for temporary custody may be utilized.[6]

The term "detainer" is not defined in the Agreement. As the court below noted, however, the legislative history contains a definition offered by Congressman Kastenmeier in proposing the Agreement: "For the purpose of the legislation a detainer is a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to stand trial on pending criminal charges in another jurisdiction." 116 Cong. Rec. 13999 (1970). (Pet. App. 6a, 7a)[7] The writ originally served upon the Warden of the Aubrun Correctional Facility gave the Warden just that notification (A.9). It is for this reason that the court below was correct in holding that the writ operates as a detainer for the purpose of the Agreement. Although the writ is not the administrative "hold" that the word "detainer" usually brings to mind, its character as official notification of pending criminal prosecution triggers the application of the Agreement.

The United States attempts to distinguish the detainer from the writ on the ground that the former defers charges, whereas the latter signals an intent to proceed. (Pet. Brief 15) It relies upon the rationale of Judge Mansfield, dissenting, in the court below, that "The writ is executed at once and upon return of the prisoner to the state institution, it does not remain outstanding against him as would a detainer." (Pet. App. 20a)

In the absence of further restriction, however, the language employed in the writ would allow the defendant to be shuttled back and forth indefinitely from his place of confinement to his

[6]A Congressional understanding that the writ is not mandatory is at least implicit in the legislative history of the Agreement. The Senate Report, 1970, 3 U.S. Code Cong. and Admin. Laws 4864 at 4865 stated, ". . . A Governor's right to refuse to make a prisoner available is *preserved* . . ." (Emphasis supplied)

[7]See also the Senate Report, S. Rep. No. 1356, 91st Cong. 2d Sess., 3. U.S. Code and Admin. News 4864, 4865 (1970).

place of trial.[8] Congress, in enacting the Agreement, apparently viewed such shuttling of prisoners to be contrary to its objectives. Article V(e) of the Agreement provides that, "At the earliest practicable time consonant with the purpose of this Agreement, the prisoner shall be returned to the sending state." Article IV(e) of the Agreement provides,

> "If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e), hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."

As the court below held, it is plain from this language that Article IV(e) of the Agreement was designed to avoid the shuttling of prisoners back and forth as destructive of their ability and desire to participate in rehabilitative programs. (Pet. App. 10a) Participation in an ongoing treatment program requires continuous physical presence which is not possible when multiple trips are made to a foreign jurisdiction. Furthermore, the psychological strain resulting from the possibility of a future sentencing decreases an inmate's desire to participate in a treatment program, *United States ex rel Esola v. Groomes*, 520 F2d 830 at 837 (C.A. 3)

Hence, the error of Judge Mansfield in his dissent in the court below. Although the writ is immediately executed, it is an instrument of multiple transfer, and does not dispose of the prospect of prosecution which remains in the mind of both

[8]The writ involved in John Mauro's case provided that the defendant be produced on a specified day, and ". . . at the termination of the proceedings in the said United States District Court on that particular day, that you return him forthwith to the Warden, Auburn Correctional Facility, Auburn, N.Y., under safe and secure conduct." (A.9)

prisoner and Warden.[9] This effect of the writ is clearly one to which the Agreement is addressed.

The government argues that treatment of the writ as a "detainer" is inconsistent with the plain language of the Agreement, as well as its purpose, since the Agreement appears to regard the lodging of a detainer and a request for custody as discrete events. (Pet. Brief p. 6)[10]

The detainer and the request will often occur at different times. There is no reason, however, that they may not occur simultaneously, when it is remembered that a detainer is essentially a notification of pending charges. As the court below correctly held, to hold otherwise would be to permit the United States to evade the Agreement simply by using the traditional writ. If the request for custody and the detainer must be separate documents in order for the Agreement to be binding, then the Agreement has "wax teeth and is an exercise in legislative futility". *United States ex rel Esola v. Groomes, supra*, 520 F2d at 837. Furthermore, a construction of the Agreement to the effect that the writ cannot serve as a detainer would controvene the proviso of Article IX of the Agreement that, "This agreement shall be liberally construed so as to effectuate its purposes."

The government argues that it may not now circumvent the purposes of the Agreement by utilizing the writ, because the purposes of the Agreement are safeguarded by the Speedy Trial Act of 1974. The government points to the provisions of the Speedy Trial Act regarding trial of prisoners obtained from other

[9]The confining institution may well alter a prisoner's status after his return from the receiving jurisdiction because of its awareness of pending prosecution. Thus the writ may well be treated as a detainer by the receiving jurisdiction.

[10]Article IV(a) provides that a prosecutor in a receiving state, "shall be entitled to have a prisoner against whom he has lodged a detainer . . . made available . . . upon presentation of a written request . . .".

jurisdictions.[11] (Pet. Brief p. 17). This argument has little or no bearing in the construction of Congressional intent in enacting the Agreement. The Agreement was enacted in 1970.[12] The Speedy Trial Act of 1974 was actually enacted in 1975.[13] If the rights of prisoners, as recognized by the Agreement, were safeguarded only by the Speedy Trial Act, then a five year hiatus emerges in the statutory scheme which Congress must have contemplated in implementing the goals of the Agreement.[14]

At the heart of the government's contention vis-a-vis the Speedy Trial Act is a request that this court dismiss the Agreement as mere surplusage, and to repeal it, because, in the government's opinion a subsequent act of Congress serves the same purpose. There is, however, a presumption against construing a statute as containing mere surplusage, *United States v. Blasius*, 397 F2d 203, 207, and a request that the Agreement be repealed is more appropriately addressed to Congress, *Dorszynski v. United States*, 418, US 424, 442 (1974). Most importantly, the Speedy Trial Act and the Agreement were enacted to achieve different purposes, although they overlap. The goal of a swift trial is of course common to both, but it is but a corollary to the Agreement's major objectives. That their purposes differ is seen from the fact that the "no return" proviso of Article IV(e) of the Agreement does not appear in the Speedy Trial Act. It is natural that it would not, since it is clearly designed

[11]The Speedy Trial Act of 1974 provides that the United States must promptly secure a state prisoner for trial or file a detainer against him after charging him with a crime. 18 USC. (Supp. V) 3161 (J) (I). If the prisoner is produced for arraignment, he must be tried within sixty (60) days.

[12]Pub. L.91-538 Sec s., Dec. 9, 1970, 84 Stat. 1397-1403.

[13]Pub. L.93-619, Title I, Sec. 101, Jan. 3, 1975, 88 Stat. 2076.

[14]Ironically, it has been particularly within that period that the government has ignored the Agreement in the production of state prisoners.

to prevent the shuttling of prisoners back and forth, with its attendant effects of their prospects of rehabilitation. (Pet. App. 10a) In recognition of the distinct purposes of the two Acts, Congress provided in the Speedy Trial Act that a prisoner's right to contest the legality of his transfer from one jurisdiction to another is preserved. 18 USC. Supp. V 316 (J)(4).[15]

Thus the material consequence of including the *ad prosequendum* writ in construction of the term "detainer" is that the Agreement is given full effect. Although, the government may consider imposition of the Article IV(e) sanction a technical windfall, Congress apparently intended otherwise. In enacting the Agreement, Congress did not deal with an individual situation, but with a scheme for the production of prisoners that is national in scope. Its prime concern was that the government comply with that scheme. *United States v. Sorrell*, 413 F. Supp. 138 at 141 (E.D.P.A.).

As the government observes, it is difficult in this case to determine whether the use of the writ in producing the respondents had effect upon their eligibility for rehabilitative programs. (Pet. Brief p. 19). The government, however, fails to state the reason for that difficulty. The government had lodged detainers against the respondents prior to producing them by writ. (Pet. Brief p. 6n 5). Those detainers were for contempt of court, the self-same conduct which was the basis of the indictments against them. Because of these detainers, all privileges were denied them. (A 23, 28, 32).[16]

[15]"In preserving the defendant's right to challenge the legality of his being surrendered by the custodial authority, the Committee does not intend in any way to change existing law." House Report No. 1508, 4 U.S. Code & Admin. News 7478.

[16]The respondents argued in the court below, and they note their position here, that the government did all it could to call the machinery of the Agreement into play. Detainers, albeit for civil contempt, were lodged against them prior to their production in federal court. Those detainers described the charges against the respondents as "contempt of court" (A-28). There would have been little reason for a new detainer to be lodged against them stating the same charge arising out of the same indictment.

In conclusion, an examination of the Interstate Agreement on Detainers Act compels the conclusion that Congress intended it to provide the exclusive means of effecting a transfer between two participating jurisdictions for the purpose of prosecution. The Agreement is applicable whenever a state prisoner is transferred for trial in federal court by means of the writ of *habeas corpus ad prosequendum*.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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